

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 10495

BRIEF FOR PETITIONERS AND JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1950

163

ARROW AIRWAYS, INC., ET AL., *Petitioners*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

Petition of Arrow Airways, Inc., et al., For Review
of an Order of the Civil Aeronautics Board

United States Court of Appeals
For the
District of Columbia Circuit

FILED MAR 20 1950

Joseph W. Stewart
CLERK

GEORGE BERKOWITZ
270 Broadway
New York 7, New York

HARRINGTON & GRAHAM
454 Washington Building
Washington 5, D. C.
Attorneys for Petitioners

SUBJECT INDEX

	PAGE
Jurisdictional Statement	1
Statutes Involved	2
Statement of Points	5
Statement of the Case	6
Summary of the Argument	10
Argument	11
Conclusion	23

CASES CITED

Acme Fast Freight Lines, Inc. v. United States, 30 F. Supp. 969 (D. C. S. D. N. Y.)	15
Acme Fast Freight, Inc., Common Carrier Application, 8 M. C. C. 211	15
Columbia Broadcasting System v. United States, 316 U. S. 407, 86 L. Ed. 1563, 62 S. Ct. 1194	15
Re Crane, 27 Idaho 671, 151 P. 1006, aff'd. 245 U. S. 304, 62 L. Ed. 304, 38 S. Ct. 98	12
Daley v. Beery, 45 N. D. 287, 178 N. W. 104	12
Dibble v. Northern Assurance Co., 70 Mich. 1, 37 N. W. 704	14
I. C. C. v. Chicago Food Mfgs. Pool Car Group, 39 F. Supp. 283, (D. C. Ill.)	14
L. B. Wilson, Inc. v. F. C. C., 83 U. S. App. D. C. 176, 170 F(2d) 793	19, 23
Lancey v. King County, 15 Wash. 9, 45 P. 645	12
Lovejoy v. Portland, 95 Ore. 459, 188 P. 207	12
Re Miller, 29 Ariz. 582, 244 P. 372	12
Philadelphia Co. v. S. E. C., 82 U. S. App. D. C. 355, 164 F(2d) 889	23
Railway Express Agency Application, 2 C. A. B. 531....	15
Railway Express Agency, Inc., Determination of Status, 21 M. C. C. 161	15
Seamans v. Knapp Stout & Co., 61 N. W. 757, 27 A. L. R. 362	14
Short v. Johnson, 90 Okla. 21, 215 P. 945	12
Southern Indiana Express Co. v. United States Express Co., 88 F(2d) 659	15
Standard Airlines v. C. A. B., ... U. S. App. D. C., 177 F(2d) 18	19, 23

	PAGE
United States v. Morsman, 42 F(2d) 448	15
United States v. N. E. Rosenblum Truck Lines, 315 U. S. 50, 86 L. Ed. 676, 62 S. Ct. 445	14
W. J. R., The Goodwill Station, Inc. v. F. C. C., 84 U. S. App. D. C., 174 F(2d) 266.....	19

STATUTES CITED

5 U. S. C. A. § 1001	18
5 U. S. C. A. § 1003	11
5 U. S. C. A. § 1004	22
5 U. S. C. A. § 1006	2
5 U. S. C. A. § 1008	16
5 U. S. C. A. § 1009	2
49 U. S. C. A. § 301	14, 15
49 U. S. C. A. § 402	9
49 U. S. C. A. § 416	10
49 U. S. C. A. § 488	14
49 U. S. C. A. § 489	14
49 U. S. C. A. § 492	15
49 U. S. C. A. § 646	2

OTHERS

Airline Industry Investigation, Hearings before the Committee on Interstate and Foreign Commerce, United States Senate, 81st Congress, 1st Session, Part 1	8
Anno. 64 Am. St. Rep. 70	12
Investigation of Nonscheduled Air Services, 6 C. A. B. 1049	7, 22
Moore & Hahn, <i>Regulation of Irregular Air Carriers</i> , 35 Cornell L. Q. 48	7
Netterville, <i>The Regulation of Irregular Air Carriers: A History</i> , 16 J. Air Law and Commerce 414	14
S. Rept. No. 752, 79th Congress, U. S. Congress, Com- mittee on the Judiciary to accompany S-7, dated November 19, 1945	16
C. A. A. Press Release No. 399	9

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT
January Term, 1950

No. 10495

ARROW AIRWAYS, INC., ET AL., *Petitioners*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

Petition of Arrow Airways, Inc., et al., For Review
of an Order of the Civil Aeronautics Board

BRIEF FOR PETITIONERS

JURISDICTIONAL STATEMENT

Arrow Airways, Inc.; Central Air Transport, Inc.; Federated Airlines, Inc.; Great Lakes Airlines, Inc.; Modern Air Transport, Inc.; Peninsula Air Transport, Inc.; and Trans American Airways, Inc., all are adversely affected and aggrieved by the order of the Civil Aeronautics Board, dated November 4, 1949, which adopted Amendment No. 1 to Part 242 and Amendment No. 2 to Part 291, Economic

Regulations, Civil Aeronautics Board. This Court has jurisdiction to review this order under Section 1006 of the Civil Aeronautics Act of 1938 (52 Stat. 1024, 49 U. S. C. A. § 646), and Section 10 of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. A. § 1009).

STATUTES INVOLVED

1. ADMINISTRATIVE PROCEDURE ACT:

Order and Adjudication.

- (a) Sec. 2(d) "Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

License and Licensing.

- (b) Sec. 2(e) "License" *includes* the whole or part of any agency permit, certificate, approval, registration, charter, membership, *statutory exemption or other form of permission*. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license. (Italics supplied)

Adjudication.

- (c) Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, . . .
- (a) Notice of hearing and issues.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof;

(2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the *matters of fact and law asserted*. . . .

(b) Procedure.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8 of this title. (*Italics supplied*)

Hearings.

- (d) Sec. 7. In hearings which section 4 or 5 of this title requires to be conducted pursuant to this section—

* * * *

(c) Evidence.—. . . *no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence*. . . .

(d) Record.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 *Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.* (*Italics supplied*)

Decisions.

- (e) Sec. 8 In cases in which a hearing is required to be conducted in conformity with section 7—

* * * *

(b) Submittals and Decisions.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. *All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.* (Italics supplied)

Sanctions and Powers.

(f) Sec. 9 In the exercise of any power or authority—

(a) In general.—*No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.* (Italics supplied)

(b) *Licenses.*—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings re-

quired by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

STATEMENT OF POINTS

1. The Order is an attempt to regulate ticket agents over which Respondent has no jurisdiction.

2. By reason of the substantial difference between the draft release issued on or about April 13, 1949, and the Amendments adopted by the Order of November 4, 1949, the petitioners were not afforded notice required by the Administrative Procedure Act.

3. The adoption and enforcement of the regulations referred to is an arbitrary, unlawful and improper exercise of respondent's rule making power.

4. The Board's authority to approve or disapprove agreements is limited to agreements between air carriers and other common carriers and does not extend to contracts between air carriers and ticket agents.

5. The Order of the Board limits the license previously granted to certain of the petitioners herein; and thus deprives them in part of vested property rights, without

notice and hearing, by a proceeding to which the petitioners were not parties; and without a finding by the Board with respect to the public interest requirements of Section 416 (b) of the Civil Aeronautics Act.

STATEMENT OF THE CASE

On April 13th, 1949, the Civil Aeronautics Board issued Draft Release No. 38 which purported to give notice of a rule making proceeding leading to the amendment of the Civil Aeronautics Board Economic Regulations.

On November 4th, 1949, the Board adopted the amended Economic Regulations and ordered them to become effective December 10th, 1949.

On December 31st, 1949, petitioners instituted the proceeding in this Court challenging the validity of the amended Economic Regulations adopted by the Board.

The amended Economic Regulations pertain to and affect all Large Irregular Air Carriers and the following statement is incorporated here as background information on this segment of the air transportation industry.

When Congress passed the Civil Aeronautics Act of 1938, it provided authority to the Board for the issuance to air carriers of certificates of public convenience and necessity. It also provided authority to the Board to classify carriers according to the nature of the services they perform, and to exempt any class of carriers from the requirements of the Act, or any regulation thereunder, upon making certain findings as to that class. By regulation, the Board created a classification of non-certificated carriers which do not operate, or hold themselves out to the public as operating between designated points regularly. This regulation required as a prerequisite to operation thereunder that no air carrier within that classification should operate without registration, issuable only by the Board after application.

The importance of the operations of non-certificated carriers under this regulation of the Board was of relative unimportance until after the end of World War II.¹

At that time, there were a great number of young men who had learned the air transportation business and there was a huge surplus of aircraft.

The young veterans bought the surplus aircraft and applied to the Civil Aeronautics Board for certificates of public convenience and necessity.

The normal certification proceeding before the Board may well last for a matter of several years before any certificate of public convenience and necessity is issued. Hence, these young veterans immediately proceeded to operate an air transportation business under the exemption regulation, after they had applied for and obtained Letters of Registration from the Board.

They had the know how,—the armed services gave them that.

They had the equipment,—the War Assets Administration sold them that.

¹ "Impressed with the tremendous strides made by air transportation in the course of the War, the Civil Aeronautics Board anticipated that a re-examination of the operating authority for non-scheduled carriers would be necessary and launched an *Investigation of Nonscheduled Air Services* in 1944. The result of this proceeding was an amendment of Section 292.1 to require registration of nonscheduled carriers and to discontinue the exemption from the bar against unfair methods of competition embodied in Section 411. On June 15, 1946, just ten days before this amendment was to become effective, a new revision of the exemption authority for the non-scheduled operators was proposed and was distributed widely throughout the industry for written comments. After having studied the comments and heard extensive oral argument, the CAB adopted this revision which became effective on June 10, 1947. It was this version of Section 292.1 which was in use during most of the period of postwar growth of the non-certificated airlines. . . ." Moore and Hahn, *Regulation of Irregular Air Carriers*, 35 Cornell L. Q. 48, 52-3.

They had the Letter of Registration,—the Civil Aeronautics Board issued them that.

The only thing they needed was business and they got that from travel bureaus. These travel bureaus engendered the passengers. They advertised, and they sold exchange orders. These exchange orders were in turn delivered by the passenger to the large irregular carrier and exchanged for a ticket and passage. The travel bureaus gave the business to the large irregular carriers because the large irregular carriers paid higher commissions to the travel bureaus than the certificated carriers would pay.

The net result has been a huge boom in the entire air transportation business. These large irregular carriers have not diverted passengers from the certificated carriers; rather their low fares have attracted a new class of air passengers,—passengers who do not mind high density seating, who do not want fancy meals and frills aloft, passengers who do not insist upon exact compliance with schedules, passengers who want rather the convenience of fast air transportation at the cost of surface transportation. These are the source of traffic to the large irregular carriers, and the increased total volume of passengers has so increased the business of the certificated carriers that now some of them are operating at a profit.

These large irregular carriers, however, have operated entirely without the benefit of any subsidy payment from the Government. They have operated at a profit² while the certificated carriers traditionally have operated on deficit financing.

Certain certificated carriers have now begun to operate at a profit. At least the Administrator of Civil Aeronau-

² See Air-Line Industry Investigation, Hearings, Committee on Interstate and Foreign Commerce, U. S. Senate, Part I, Table IX, p. 504.

tics believes this profit operation may be attributable to the lower fares without frills or service.³

Certainly the existence of large irregular carriers is in the public interest,⁴ and they have contributed to competition in the air transportation industry as required by Congressional Declaration of Policy as expressed in 49 U. S. C. A. 402(d).⁵

On December 10, 1948, the Board issued Draft Release No. 33 entitled, "Irregular Air Carriers—Amendment and Partial Repeal of Irregular Air Carrier Exemption" and further entitled "Notice of Proposed Rule Making".

On January 12, 1949, the Board issued Draft Release No. 33-A entitled, "Irregular Air Carriers—Amendment and Partial Repeal of Irregular Air Carrier Exemption" and further entitled "Supplemental Notice of Proposed Rule Making and Oral Argument Thereon".

On January 26, 1949, the Board issued Draft Release No. 33-B entitled, "Irregular Air Carriers—Amendment and Partial Repeal of Irregular Air Carrier Exemption" and further entitled "Supplemental Notice of Issues for Oral Argument on February 15, 1949".

As a result of these many notices and of their widespread distribution throughout the industry, both large irregular carriers and certificated carriers submitted written comments, personally appeared and were heard on two days of public hearings and also submitted additional written comments after the public hearings.

³ C. A. A. Press Release No. 399: "Airlines had biggest year in 1949, C. A. A. head reports."

⁴ See paragraph 8, Classification of Exemptions, Irregular Air Carriers, Appendix p. 23 A at 27 A.

⁵ See also statement of Herbert A. Bergson, Ass't. Atty. Gen., Airline Industry Investigation, *supra*, Part 1, 247.

On April 13, 1949, the Board adopted Economic Regulations Revision of Section 292.1, and ordered them to become effective May 20, 1949. It is noteworthy that the revision did not affect ticket brokers, did not change the large irregular carriers' method of doing business, and really only required the large irregular carriers to file for an individual exemption under Section 416 (b) of the Act, rather than to operate under a blanket exemption. In other words, all the "hookers" from all the Draft Releases were removed from the revision as actually issued and they were placed in the new Draft Release No. 38, the timing of the issuance of which was conceived and executed by the Board so as to pass almost unnoticed and which was deceptively entitled "Forms of Reports of Financial and Operating Statistics Reporting Requirements for Irregular Air Carriers". As proof of the success of the deception, the Board received substantially no written comments to this Draft Release and the Board received no requests for and heard no oral arguments for or against this Draft Release.

SUMMARY OF ARGUMENT

I. The notice given by Draft Release No. 38 fails to meet the rule making requirements of the Administrative Procedure Act because its issuance was so timed and its purpose so camouflaged by misstatements and omissions, that it misdescribed the subjects and issues involved and mislead the entire air transportation industry.

II. The amended economic regulations control the relationships and activities of ticket brokers over whom the Board has no statutory jurisdiction.

III. Since the amended economic regulations limit the license of the large irregular carriers, both the defective notice given by Draft Release No. 38 and the absence of

any hearing violate the due process clause of the Constitution and the adjudication requirements of the Administrative Procedure Act.

ARGUMENT

I. Petitioners Were Not Afforded Notice Required by Administrative Procedure Act

The Administrative Procedure Act requires general notice of proposed rule making¹ and specifically requires, in part, that such notice shall include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." The Civil Aeronautics Board purports to have complied with this requirement by the issuance of Draft Release No. 38.²

It is petitioners' contention that Draft Release No. 38 does not set forth either the terms or the substance of the rules adopted nor a description of the subjects and issues involved.

The Draft Release is entitled "Forms of Reports of Financial and Operating Statistics Reporting Requirements for Irregular Carriers." This title when examined in the light of the rule adopted is clearly misleading. The title of proposed legislation traditionally is associated with clear, concise and complete description of the legis-

¹ 5 U. S. C. § 1003(a).

² Amendment No. 1 to Part 252 adopted November 4, 1949: "Interested persons have been afforded an opportunity to participate in the making of this amendment in connection with the Board's Draft Release No. 38, dated April 13, 1949 (14 F. R. 1895) and full consideration has been given to all relevant matter presented."

Amendment No. 2 to Part 291 adopted November 4, 1949: "Interested persons have been afforded an opportunity to participate in the making of this amendment in connection with the Board's Draft Release No. 38, dated April 13, 1949 (14 F. R. 1895) and full consideration has been given to all relevant matter presented."

lation proposed.³ The misleading nature of the title is accentuated by the misleading character of the first paragraph which reads:

"... The proposed amendments are designed to supply the Board with additional information concerning the operations of Large Irregular Carriers in their relations with ticket agencies, brokers or other traffic soliciting or traffic generating instrumentalities. The Board has found that the adequate enforcement of the Act and its regulations has been hampered through a lack of information in this area of Irregular Air Carriers' operations."

Paragraph 5 of Draft Release 38 should be compared with Section 291.26(b) of the adopted regulation. Paragraph 5 indicates merely a proposal to clarify existing prohibitions against conspiracies to violate existing regulations. Section 291.26(b) is far more reaching and creates an entirely new and different prohibition. The prohibition has absolutely no relation to the purported nature of the proposed rules as set forth in the title and in the introductory paragraph of the Draft Release.

Paragraph 4 of Draft Release No. 38 should be compared to Section 291.24 of the amended regulation. Paragraph 4 makes no mention of a proposal to require the *date of flight* to be incorporated on the ticket at the time

³ The purpose of a title is to give a general statement of and call attention to the subject matter of an act. *Re Crane*, 27 Idaho 671, 151 P. 1006, aff'd 245 U. S. 304, 62 L. Ed. 304, 38 S. Ct. 98; *Lancey v. King County*, 15 Wash. 9, 45 P. 645.

In many states constitutional provisions have been adopted to the effect that the subject or object of an act shall be expressed or described in its title. *See Anno*: 64 Am. St. Rep. 70. These constitutional provisions were adopted to prevent the abusive practice of enacting laws under false and misleading titles, thereby concealing from the members of the legislature and from the people, the true nature of the laws so enacted, or of particular provisions included therein. *Re Miller*, 29 Ariz. 582, 244 P. 372; *Lovejoy v. Portland*, 95 Ore. 459, 188 P. 207; *Daly v. Beery*, 45 N. D. 287, 178 N. W. 104; *Short v. Johnson*, 90 Okla. 21, 215 P. 945.

of sale. The adopted regulation does make such requirement. Such change is of major importance and is far reaching in its effect. The absence of any mention of ticket agents in paragraph 5 of Draft Release 38 is further indication of a design to deprive petitioners and others of their right to notice and hearing.

Not only did the Board camouflage the purported notice with language and omissions which misdescribed the real subjects and issues involved, but timed the issuance of the release to coincide with the announcement proclaiming the adopting of the revision of Section 292.1.⁴ The combined effect so mislead the entire air transportation industry that only three carriers filed comments upon the proposed regulations (and two of those were certificated carriers). If the large irregular carriers, and particularly petitioners herein, had been afforded the proper notice to which they were entitled under the Administrative Procedure Act they certainly would have protested the adoption of these regulations which will put them out of business.

II. The Board Has No Jurisdiction Over Ticket Brokers

The Civil Aeronautics Board has no jurisdiction whatsoever over Ticket Brokers. For the Civil Aeronautics Board to attempt to assume jurisdiction is unlawful, and beyond the power conferred by Congress.

⁴ The revision was adopted pursuant to notice given by Draft Release Nos. 33, 33 A and 33 B; and after public hearing at which most of the Large Irregular Carriers appeared—some sending representatives from as far away as Alaska and Seattle—almost all of the Irregular Carriers submitted written comments. This participation by the Large Irregular Carriers in the rule making proceeding convened pursuant to Draft Release Nos. 33, 33 A and 33 B should be compared to complete absence of participation in the proceeding instituted by Draft Release No. 38. The petitioners state that their non-participation was caused by the inadequacy and completely misleading character of the notice.

The language of the Civil Aeronautics Act precludes any such jurisdiction. Section 408(c)¹ of the Act expressly removes air carriers' interests in ticket agencies from those groups of acts and relationships subject to the Board's approval under Sections 408 and 409² of the Act. Section 408 prohibits certain transactions between air carriers and other persons, unless approved by the Board. Section 409 of the Act, on the other hand, spells out some six types of relationships involving air carriers and others that shall be unlawful unless approved by the Board. It is clear that both these sections would apply to acts or relationships between "air carriers" and a ticket agency (any person engaged in any other phase of aeronautics), were it not for the express exclusion of such relationships made by Section 408(c).

If the Board otherwise had jurisdiction over ticket agents it still could not prohibit any of the acts or relationships relieved by 408(c) from the prohibitions of Section 408 or 409. Thus not only is there an absence of Board jurisdiction over ticket agents, but there is express provision exempting the carriers from certain of the Act's provisions, in their relations with ticket agents.³

¹ 49 U. S. C. A. § 488(c).

² 49 U. S. C. A. § 489.

³ Netterville, *The Regulation of Irregular Air Carriers: A History*, 16 J. AIR LAW AND COMMERCE 414, 424: "Direct regulation of these agencies by the Board has been impractical, if not illegal. The jurisdictional question presented is indeed perplexing, both by reason of the Board's own statute and the general law pertaining to independent brokers." Citing: "Sections 1(a) and 408(c) of the Civil Aeronautics Act; sections 203(a)(18) and 311, Motor Carrier Act of 1935, 49 U. S. C. A. § 301 *et seq.* See also: *United States v. N. E. Rosenblum Truck Lines*, 315 U. S. 50, 62 S. Ct. 445, 86 L. Ed. 676 (1942); *I. C. C. v. Chicago Food Mfgs. Pool Car Group*, 39 F. Supp. 283 (D. C. Ill. 1941); *Dibble v. Northern Assurance Co.*, 70 Mich. 1, 37 N. W. 704 (1898); *Seamans v. Knapp Stout & Co.*, 61 N. W. 757, 27 A. L. R. 362."

Even if the Board had jurisdiction and control over the Travel Agents under Sections 408 and 409, the agencies' contracts and agreements with the air carriers would be exempt from Board approval under Section 412⁴ of the Act, as the Board is only given authority to approve or disapprove contracts or agreements between *air carriers*.

The Board by Section 291.26 of the amended regulations is exercising disapproval over contracts between persons other than air carriers.⁵ That such was the Board's deliberate purpose is indicated by the following language: "The Board has also found that widespread violation of tariff and reporting requirements makes nec-

⁴ Travel agents are not indirect air carriers within the purview of Section 412 of the Act (49 U. S. C. A. § 492). The business of a travel agent has always been regarded as that of an independent middle-man. Under the Interstate Commerce Act, and under the common law as well, (which was followed generally in determining common carriers under that Act) travel agents were not regarded as carriers, per se; nor were they regarded as "indirect" carriers in any sense of the word. It was not until the adopting of the Motor Carrier Act (49 U. S. C. A. § 301) that such independent businesses were brought within the ambit of modern public utility concepts. In that Act we find the "Broker" provision, which provides for no more than a licensing system for such businesses. It is interesting to note that the Civil Aeronautics Act, which was adopted after the Motor Carrier Act, and patterned after the former act in many respects, did not encompass the Broker provision of the former Act, nor anything comparable to it. The decisions of ICC, and of the courts further prove the validity of the proposition that "indirect air carrier" does not include travel agents as such. (See: *Acme Fast Freight, Inc., Common Carrier Application*, 8 MCC 211 (1938); *Acme Fast Freight, Inc. v. United States*, 30 F. Supp. 969 (D. C. S. D. N. Y. 1940); *Railway Express Agency, Inc., Determination of Status*, 21 MCC 161 (1939); *United States v. Morsman*, 42 F. (2d) 448 (1890); *Southern Indiana Express Co. v. United States Express Co.*, 88 F. (2d) 659; *Railway Express Agency Application*, 2 CAB 531 (1941).

⁵ *Columbia Broadcasting System v. U. S.*, 316 U. S. 407, 418, 86 L. Ed. 1563, 62 S. Ct. 1194. "If the regulations are valid they alter the status of appellant's contracts and thus determine their validity in advance."

essary more stringent regulation of the relationship between ticket agents and large irregular carriers."

Particular attention may be directed to the Administrative Procedure Act, Section 9(a).⁶ That section provides that, "In the exercise of any power or authority no sanction shall be imposed or substantive rule or order issued except within the *jurisdiction delegated to the agency* and as authorized by law." The term sanction, according to Section 2(f) of that Act, includes the whole or part of any agency "(1) *prohibition, requirement, limitation*, or other condition affecting the freedom of any person; . . . (6) requirement, revocation, or suspension of a license, or (7) taking of other *compulsory or restrictive* action." The very purpose of this section is to assure that governmental agencies will not appropriate to themselves powers Congress has not intended them to exercise, either directly or *indirectly*.⁷ The regulation as it now stands does just that.

Since the Board does not have jurisdiction over Travel Agents, and since it is assumed that the Board has considered the problem at length and determined for itself that it has no such jurisdiction,⁸ this regulation can only be taken to mean that the Board is here attempting to do by a "rule making" artifice that which it could not do by direct command or order. For the Board to say to the Travel Agents, "You are operating without authority from the Board, and must therefore close your doors," would be readily recognized as an arbitrary exercise of power,

⁶ 5 U. S. C. A. § 1008.

⁷ S. Rept. No. 752, 79th Congress, U. S. Congress, Committee on the Judiciary, to accompany S. 7, dated November 19, 1945, at page 211.

⁸ The fact that the Board does not attempt to impose any regulation *directly* on the travel agencies is an obvious admission by the Board that it is without jurisdiction over such agencies.

far beyond the jurisdiction conferred on the Board by Congress. On the other hand, for the Board to say to all the carriers in an industry, "You cannot do business with the travel agents" is to accomplish the same end, and that end is equally beyond the authority of the Board.

Travel Agents, who are not under the jurisdiction of the Board, suddenly find themselves being put out of business by an unprecedented move on the part of the Board. The carriers, without notice and opportunity to be heard, are suddenly to be deprived of their chief sources of traffic and their very substantial goodwill benefits derived from those ticket agencies. Neither result could conceivably be defended as having been accomplished in a manner consistent with due process. But even if the affected parties had been given a hearing, the jurisdictional defect still remains to denounce the regulation as one clearly beyond the Board's statutory authority. The Board, by administrative caprice, is obviously attempting to do indirectly that which it cannot do directly. The net result is complete turmoil on all sides.

If the enforcement powers of the Board are inadequate to its desires and convenience, either as an administrative fact or as a matter of personal opinion, it is not within the power of the Board to amend the Act and substitute its own judgment for that of Congress. This regulation is clearly an attempt to substitute the rule of administrative whim for the orderly and protective processes of the law.

III. The Board's Action Deprives the Petitioners of Property Without Due Process of Law

The amended regulations effectively revoke the operating authority of petitioners' letters of registration; such effect characterizes the Board's action as an adjudication

within the meaning of the Administrative Procedure Act.¹ That act and the due process clause of the 5th amendment to the Constitution give petitioners the right to notice and hearing. This right was violated by the Board.

A. The Regulation Effectively Revokes in Whole or in Part Petitioners' Operating Authority and Destroys Petitioners' "Investment and Business Property"

1. THE LICENSE

The Board specifically limited and conditioned the scope of the license granted to petitioners. In Amendment No. 2 to Part 291 the Board says:

"The purpose of the proposed regulation is to facilitate bringing these arrangements under Board scrutiny and control by the following actions:

1. Limiting the scope of the exemption authority granted so as to exclude from such authority the transportation of passengers by large irregular carriers to whom tickets, or passes in appropriate cases, have not been issued. . . .
2. Imposing as conditions to the continued holding of a letter of registration. . . ." (Appendix 49 A.)

The Board has power to suspend letters of registration when in the opinion of the Board such action is required

¹ Title 5 U. S. C. A. § 1001 (d) Order and Adjudication. "Order" means the whole or any appt of the final disposition, (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) License and Licensing. "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

in the public interest.² Presumably the power to suspend and revoke includes the power to limit. But notice and oral hearing are prerequisite to a modification,³ suspension,⁴ or revocation.⁵ Similarly notice and oral hearing must be a prerequisite to the imposition of a limitation, for a limitation is but a suspension or revocation in part. Otherwise the Board could defeat the petitioners' constitutional rights by severe or successive limitations which totally effect a complete suspension or revocation.

2. INVESTMENT AND BUSINESS PROPERTY

Compliance with the adopted regulation will require petitioners to completely change their method of doing business, and no matter what alternative they adopt, they will violate other provisions of the regulations.

(a) *If petitioners continue to do business with travel brokers*, they must completely change their method of accepting passengers as well as their present method of operation.

They must enter into a written contract with the Travel Bureau. At the present time they are accepting passengers from any one of several travel bureaus on an oral understanding with respect to each acceptance of any passenger.

They must make each travel bureau from whom they accept passengers their agent. At the present time the

² The Board failed to make the necessary finding that public interest required suspension of that portion of the exemption authority which was eliminated by its limitation.

³ *L. B. Wilson, Inc. v. F. C. C.*, 83 U. S. App. D. C. 176, 170 F. (2d) 793; *W. J. R., The Goodwill Station, Inc. v. F. C. C.*, 84 U. S. App. D. C., 174 F. (2d) 226.

⁴ *Standard Airlines v. C. A. B.*, ... U. S. App. D. C., 177 F. (2d) 18.

⁵ See Economic Regulations § 412.6 (vi).

travel bureau is the agent of the passenger. All of its relationships are with the passenger and its only relationship with the large irregular carrier is to turn the passengers over to whatever large irregular carrier will agree to carry them.

They must file with the Civil Aeronautics Board each written agreement with each travel bureau. At the present time, of course, there being no necessity for such contract there is no necessity for such filing.

They must not accept any payment from any travel bureau excepting under the provisions of the standardized settlement clause specifically spelled out in the amended Economic Regulations. At the present time, the settlement between the large irregular carrier and the travel bureau is based on the exchange orders and is usually worked out more or less informally in advance of the carriage of the passengers, since there is no provision in the existing regulations covering this subject matter.

The new regulation will require them to extend credit to the travel brokers because of the physical impossibility of preparing required vouchers before plane departure.

They must file with the Civil Aeronautics Board a copy of any advertisement, circular, pamphlet, brochure, publicity material, announcement, or notice issued by them. At the present time there is no provision for any such filing.

They must completely revise their ticketing requirements. Each ticket must then contain the name and address of the carrier, the name and address of the passenger, the date of sale, *the date of flight*, the point of origin, the point of destination and the fare actually paid by the passenger, as well as the signature of an officer or employee of the large irregular carrier or its agent. At the present time, not only do the regulations of large irregular carriers

NOT require all this information, but the regulation of the certificated carriers do not require all this information on their tickets.

But, even if the large irregular carriers continue to accept passengers from travel bureaus and change their method of operation to comply with all of the above requirements of the amended economic regulations, they must still face the real hurdle, namely, that each large irregular carrier must conduct its operation so that not only will it alone be irregular in and of itself, but each large irregular carrier must conduct its operation so that it and the totality of all the operations of all the other large irregular carriers who accept passengers from the same travel bureau will be irregular. Such is impossible.

(b) *If petitioners cease to do business with travel brokers*, they must try to engender their own passengers. They must establish and maintain ticket offices in the cities into which they operate. They must hire personnel, advertise, sell tickets to and otherwise deal with passengers and the general public.

This is not only prohibitively expensive, but cannot be effected without creating "an implication of a uniform pattern of normal consistency of operation," within the prohibition of Section 292.1 of the Economic Regulation, as that section has been interpreted by the Board.

(c) The regulations are so drawn that compliance with one section of the regulation requires violation of another section. Thus it is impossible for petitioners to operate in compliance with regulations. For example: Section 291.24 requires that the ticket "shall have entered thereon at the time of sale" (among other things) *the date of flight*. In order to comply with this requirement the carrier must schedule the flight in advance of the ticket sale. If flights are scheduled in advance the carrier ceases to

be an irregular carrier within the definition of Section 292.1 as interpreted by the Board.⁶

B. Notice

Section 5 of the Administrative Procedure Act⁷ provides:

"Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held, and (3) the matters of fact and law asserted. . . ."

Draft Release No. 38 does not comply with these requirements of Section 5, because the Board purported to act in an exercise of its rule making function, and accordingly purported to comply with Section 4 of the Administrative Procedure Act rather than Section 5. The release clearly does not set forth "the matters of fact and law asserted."

Thus even if the Court determines that Draft Release No. 38 was sufficient notice for "rule making", it nevertheless is deficient as a prerequisite to "adjudication".

C. Hearing

"An opportunity to present contentions orally . . . is one of the rudiments of the fair play required when prop-

⁶ "It therefore becomes apparent that 'nonscheduled' has a far more restrictive meaning than the mere absence of a published timetable. . . . The irregularity contemplated for exemption is that which neither directly nor indirectly leads the public to believe that between given points a reasonably certain number of flights per day or per week, or flights at approximately certain times, or *on certain days may be anticipated with a reasonable degree of assurance.*" (Italics supplied.) Investigation of Nonscheduled Air Services, 6 CAB 1049 at 1055.

⁷ 5 U. S. C. A. § 1004.

erty is being taken or destroyed.”⁸ Such opportunity was not accorded petitioners.

Since the amended Economic Regulations limit the license of the petitioners both the defective notice given by Draft Release No. 38 and the absence of any oral hearing violate petitioners’ rights under the due process clause of the Constitution and under the Administrative Procedure Act.

IV. CONCLUSION

For each and all of the reasons set forth above the amended regulations are void and of no effect, and the Court should so decree.

Respectfully submitted,

DAYTON M. HARRINGTON
JAMES D. GRAHAM, JR.
HARRINGTON & GRAHAM
454 Washington Building
Washington 5, D. C.

GEORGE BERKOWITZ
270 Broadway
New York 7, New York
Attorneys for Petitioners

⁸ *Standard Airlines v. C. A. B.*, ... U. S. App. D. C., 177 F. (2d) 18, 21; *L. B. Wilson, Inc. v. F. C. C.*, 83 U. S. App. D. C. 176, 186, 170 F. (2d) 793, 803; cf. *Philadelphia Co. v. S. E. C.*, 82 U. S. App. D. C. 355, 367, 164 F. (2d) 889, 901.

APPENDIX

INDEX

	PAGE
Petition for review	2A
Draft release no. 33.....	6A
Draft release no. 33-B.....	20A
Regulations serial no. ER-142.....	23A
Board press release re regulation ER-142 and draft release no. 38.....	39A
Draft release no. 38	42A
Regulation serial no. ER-153.....	45A
Regulation serial no. ER-154.....	48A

1 A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,495

ARROW AIRWAYS, INC., ET AL.,
Petitioners,

VS.

CIVIL AERONAUTICS BOARD,
Respondent.

Petition for Review of the Order of the
Civil Aeronautics Board

JOINT APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARROW AIRWAYS, INC.; CENTRAL AIR TRANSPORT, INC.; FEDERATED AIRLINES, INC.; GREAT LAKES AIRLINES, INC.; MODERN AIR TRANSPORT, INC.; PENINSULA AIR TRANSPORT, INC.; and TRANS AMERICAN AIRWAYS, INC.,

Petitioners,

against

THE CIVIL AERONAUTICS BOARD,

Respondent

10495

Petition for Review of an Order of the Civil Aeronautics Board

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

The joint and several petitions of ARROW AIRWAYS, INC., of CENTRAL AIR TRANSPORT, INC., of FEDERATED AIRLINES, INC., of GREAT LAKES AIRLINES, INC., of MODERN AIR TRANSPORT, INC., of PENINSULA AIR TRANSPORT, INC., and of TRANS AMERICAN AIRWAYS, INC. respectfully show to this Honorable Court as follows:

I. Nature of Proceeding

On or about April 13, 1949, the respondent issued a draft release No. 38, published in the Federal Register (14 FR 1895). That said draft release is annexed hereto and made a part hereof.

Thereafter and on or about the 4th day of November, 1949, the respondent adopted amendment No. 2 of Part 291 of the Economic Regulations and amendment No. 1 to Part 242 of the Economic Regulations, Regulations Serial No. ER-154 and ER-153, to become effective Decem-

ber 10th, 1949. A copy of said amendment is annexed hereto and made a part hereof.

This petition seeks review of the Order of November 4, 1949, adopting the above mentioned amendment.

II. Jurisdiction

1. ARROW AIRWAYS, INC. is a corporation formed and organized under and by virtue of the laws of the State of California and maintains offices in the state of California.

2. CENTRAL AIR TRANSPORT, INC. is a corporation formed and organized under and by virtue of the laws of the State of Florida and maintains offices in the State of Florida.

3. FEDERATED AIRLINES, INC. is a corporation formed and organized under and by virtue of the laws of the State of New York and maintains an office in the State of New York.

4. GREAT LAKES AIRLINES, INC. is a corporation formed and organized under and by virtue of the laws of the State of New York and maintains offices in the states of New York and California.

5. MODERN AIR TRANSPORT, INC. is a corporation formed and organized under and by virtue of the laws of the State of New York and maintains an office in the State of New York.

6. PENINSULA AIR TRANSPORT, INC. is a corporation formed and organized under and by virtue of the laws of the State of Florida and maintains an office in the State of Florida.

7. TRANS AMERICAN AIRWAYS, INC. is a corporation formed and organized under and by virtue of the laws of the State of Nevada and maintains offices in the states of Nevada and California.

8. ARROW AIRWAYS, INC., CENTRAL AIR TRANSPORT, INC., FEDERATED AIRLINES, INC., GREAT LAKES AIRLINES, INC., MODERN AIR

TRANSPORT, INC., PENINSULA AIR TRANSPORT, INC., and TRANS AMERICAN AIRWAYS, INC., are LARGE IRREGULAR AIR CARRIERS and are engaged in business in the transportation of persons and property in accordance with a license duly issued to them by the Civil Aeronautics Board.

9. Each and all of the petitioners is and are adversely affected and aggrieved by the order of the Civil Aeronautics Board of November 4, 1949, which adopted Amendment No. 2 to Part 291, Economic Regulations, Civil Aeronautics Board. This Court has jurisdiction to review this Order under Section 1006 of the Civil Aeronautics Act of 1938 (52 Stat. 1024, 49 U. S. C. § 1009), and Section 10 of the Administrative Procedure Act (5 U. S. C. § 1009).

10. Petitioners objections have not been argued to the Board because the Order of the Board is a final one in a proceeding to which the petitioners were not parties, and of which they did not have notice.

III. Points on Which Petitioners Intend to Rely

1. The Order is an attempt to regulate ticket agents over which Respondent has no jurisdiction.

2. By reason of the substantial difference between the draft release issued on or about April 13, 1949 and the Amendments adopted by the Order of November 4, 1949, the petitioners were not afforded notice required by the Administrative Procedure Act.

3. The adoption and enforcement of the regulations referred to is an arbitrary, unlawful and improper exercise of respondent's rule making power.

4. The Board's authority to approve or disapprove agreements is limited to agreements between air carriers and other common carriers and does not extend to contracts between air carriers and ticket agents.

5. The order of the Board limits the license previously granted to certain of the petitioners herein; and thus deprives them in part of vested property rights, without

notice and hearing, by a proceeding to which the petitioners were not parties; and without a finding by the Board with respect to the public interest requirements of Section 416 (b) of the Civil Aeronautics Act.

IV. Relief Requested and Reason Therefor

Petitioners respectfully pray for review of the Order complained of, and that upon such review the Court set aside the Order in whole or in part.

Petitioners further pray that this Honorable Court grant interlocutory relief by stay of the Order complained of pending determination on this petition, or in the alternative that respondent be enjoined from enforcing the regulation against any of the petitioners herein pending determination on this petition; and as good cause for such relief petitioners respectfully show as follows:

Upon information and belief the petitioners state that enforcement of the regulation will require suspension of operation by certain of the petitioners herein, will require disposal of equipment, facilities and trained personnel, and will otherwise cause petitioners irreparable injury.

Attorney for Petitioners

GEORGE BERKOWITZ, ESQ.

270 Broadway

New York 7, New York

DAYTON M. HARRINGTON, ESQ.

JAMES D. GRAHAM, JR., ESQ.

HARRINGTON & GRAHAM

454 Washington Building

Washington 5, D. C.

* * * *

1

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.
Economic Regulations

DRAFT RELEASE NO. 33

Dated: December 10, 1948

*Irregular Air Carriers**Amendment and Partial Repeal of Irregular Air Carrier
Exemption**Notice of Proposed Rule-Making*

Notice is hereby given that the Civil Aeronautics Board ("Board") has under consideration the Revision of Section 292.1 of the Economic Regulations governing Small and Large Irregular Carriers.

The proposed revision represents a new approach to economic regulation of so-called "Large Irregular Carriers", while preserving in more or less the same form the provisions currently in effect with respect to "Small Irregular Carriers". Since changes in the provisions of § 292.1 with respect to Large Irregular Carriers envisage elimination of their general exemption authority under this section and substitution of special exemption authority under section 416 of the Act in appropriate cases as determined on an individual basis by the Board, and since it is contemplated that economic regulation of the Small Irregular Carriers will continue substantially unchanged under § 292.1 the entire section has been recast in such a way as to assemble as many as possible of the provisions applicable to Small Irregular Carriers in one place at the beginning of the section, following them with the separately assembled provisions applicable to Large Irregular Carriers. It is believed that this will make it a simpler matter for each of the two classes of carriers to understand and comply with the relevant portions of the regulation.

2 The new approach to economic regulation of the Large Irregular Carriers is achieved by a provision which, broadly described, terminates their general exemption under § 292.1 thirty days after the effective date of the proposed revision and at the same time permits such

of them as have duly filed application for an individual temporary exemption within such thirty-day period to continue to enjoy their §292.1 exemption until the Board has passed on their application. This means, in effect, that the exemptions currently enjoyed by Large Irregular Carriers will be subjected to review by the Board to determine whether, in the light of all relevant considerations, such exemptions should be terminated, or should be permitted to continue in the form of individual temporary exemptions.

A second important effect of the proposed revision, that of clarifying and tightening in some respects the restrictions upon Large Irregular Carriers, and to a lesser extent restrictions upon Small Irregular Carriers, is responsive to the need for some means to cope with increased activities of such carriers outside the proper scope of the exemption they are intended to enjoy under §292.1. The provisions conferring the exemptions have been modified to state affirmatively the sections of the Act from which exemption is granted (fewer in number than previously). Even though the existing regulation was never intended to give blanket exemption from subsection 401(a) for all Irregular Air Carriers which held Letters of Registration,

the proposed revision is worded to clarify further
 3 the fact that the exemption extends only to irregular operations, and that air transportation which is not irregular is outside the exemption and in violation of the Act. The proposed revision will also clarify the fact that a Letter of Registration is merely evidence of registration and an aid to enforcement of the Act—it is not a license and confers no privileges beyond those set forth in the regulation itself. It is believed that the new language will help simplify enforcement of the provisions of the regulation in this respect.

In addition, in the case of the Small Irregular Carriers, which would continue to be exempted from Section 412 of the Act, the widespread practice of piecing together the

individually "irregular" operations of two or more carriers to make an overall pattern of regularity has been prohibited. Moreover, in the case of both Large and Small Irregular Carriers, the chief mechanism for engaging in such practices, i. e., nomination of a single ticket agency for two or more carriers, has been brought under the scrutiny of the Board by a provision requiring an affirmative showing that its use would not adversely affect the public interest or the carrier's intention and ability to conform to provisions of the Act, as a condition of its adoption or continued use. Establishment, observation or enforcement of joint rates with another air carrier by Large Irregular Carriers are forbidden.

Certain other changes are intended to prevent evasion of the regulation, notable among which is the provision preventing Large Irregular Carriers from having or retaining as an important official or owner, without Board approval, any person affiliated in a similar capacity
4 with an Air Freight Forwarder, Small or Large Irregular Carrier or Noncertificated Cargo Carrier at a time when the latter's Letter of Registration was subject to revocation or suspension action by the Board.

The new provisions governing suspension, revocation and cancellation of Letters of Registration, in the case of both Large and Small Irregular Carriers, are designed to facilitate, and lend flexibility to, enforcement of the regulation, by clarifying and strengthening the grounds for suspension, revocation and cancellation of the right to engage in irregular air transportation.

The proposed §292.1 is set forth in the attached Proposed Rule.

This amendment is proposed under the authority of Secs. 205(a) and 416 of the Civil Aeronautics Act of 1938, as amended.

Interested persons may participate in the proposed rule-making through the submission of written data, views, or arguments pertaining thereto, in triplicate, addressed to the Secretary, Civil Aeronautics Board, Washington 25,

D. C. All relevant matter in communications received on or before January 15, 1949, will be considered by the Board before taking final action.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan
M. C. Mulligan
Secretary

(SEAL)

5

Proposed Rule

It is proposed to amend the Economic Regulations Section 292.1, Irregular Air Carriers (14 CFR 292.1) in its entirety to read as follows:

(a) *Small Irregular Carriers*

(1) *Exemptions.* Except as otherwise provided in this section, each air carrier holding an effective Letter of Registration issued to it as a Small Irregular Carrier, as hereinafter defined, shall be temporarily exempted from the following provisions of Title IV of the Civil Aeronautics Act of 1938, as amended:

(i) Subsection 401(a), but only insofar as said subsection would otherwise prevent such Small Irregular Carrier from engaging in irregular air transportation of persons or property, as hereinafter defined;

(ii) Section 403;

(iii) Subsection 404(a); *provided*, that Small Irregular Carriers shall abide by those provisions of this subsection which require air carriers to provide safe service, equipment and facilities in connection with air transportation;

(iv) Subsection 404(b);

(v) Subsection 405(e);

(vi) Subsection 407(b) and (c);

(vii) Section 408;

(viii) Subsection 409(a); and

(ix) Section 412.

6

(2) *Duration.* The temporary exemption privilege provided by this paragraph (a) shall continue

in effect until such time as the Board shall find that enforcement of those provisions of Title IV of the Act from which exemption is provided in this section would be in the public interest or would no longer be an undue burden on the Small Irregular Carriers; *provided*, that upon such a finding as to any Small Irregular Carrier or class of Small Irregular Carriers, such exemption shall expire with respect to such carrier or class of carriers.

(3) *Approval of certain interlocking relationships.* To the extent that any officer or director of a Small Irregular Carrier would, without prior approval of the Board, be in violation of any provisions of subsection 409(a) of the Civil Aeronautics Act of 1938, as amended, by reason of any interlocking relationship, such relationship is hereby approved.

(4) *Effect on Other Statutes.* The temporary exemption hereinabove granted from sections 408, 409(a) and 412 shall not constitute an order made under such sections, within the meaning of section 414, and shall not confer any immunity or relief from operation of the "antitrust laws," or any other statute (except the Civil Aeronautics Act of 1938, as amended), with respect to any transaction, interlocking relationship, or agreement otherwise within the purview of such section.

(5) *Conditions to exercise of temporary exemption privilege.*

(i) *Necessity for Letter of Registration.* No person shall exercise the temporary exemption privilege conferred by this paragraph (a) unless there is in force with respect to such person a Letter of Registration issued by the Board, acknowledging that such person has been duly registered with the Board as a Small Irregular Carrier under the provisions of §292.1 of the Economic Regulations, as amended, relating to irregular air transportation. Any Small Irregular Carrier which holds a Letter of Registration issued to it, and not revoked or cancelled, prior to [effective date of amendment] is not required to obtain another Letter of Registration.

(ii) *Prohibition against using same sales agent.* No Small Irregular Carrier shall have and retain any person as an agent or representative for the sale of air transportation on the aircraft of such Carrier between two points if such person also acts, or at any time or upon any occasion (not including any time or occasion prior to [effective date of amendment]) within the preceding 30 days has acted, as agent or representative for the sale of air transportation between such points on the aircraft of any other Irregular Air Carrier; and no Small Irregular Carrier shall have and retain as an agent or representative for the sale of air transportation on the aircraft of such carrier any person which has, or proposes to have, as owner, partner, officer director, or stockholder holding a controlling interest, any individual who is or has been connected in any such capacity with any other person which at any time acted as an agent or representative for the sale of air transportation between any two common points on the aircraft of two or more Irregular Air Carriers, unless it has been shown to the Board by such carrier that the public interest and the carrier's intention and ability to conform to the provisions of the Act and requirements thereunder will not be adversely affected thereby.

8 (iii) *Prohibition against combined operations.*

No Small Irregular Carrier shall make or maintain any agreement or arrangement with any other air carrier or air carriers with respect to the conduct of air transportation services which, if conducted by a single carrier, would constitute air transportation not within the scope of irregular air transportation as hereinafter defined.

(6) *Letters of Registration.*

(i) *Issuance of Letter of Registration.* Except as provided in subparagraph (ii) hereof, upon the filing of proper application therefor the Board will issue to any Small Irregular Carrier a Letter of Registration. Such application shall be certified as correct by a responsible official of such carrier, and shall contain the following information: (a) date; (b) name of carrier; (c) mailing address; (d)

location of principal operating base; (e) if a corporation, the place of incorporation, the name and citizenship of officers and directors and a statement that at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions; (f) if an individual or partnership, the name and citizenship of owners or partners; (g) the types and numbers of each type of aircraft utilized in air transportation. Such application shall be submitted in duplicate in letter form or on CAB Form No. 2789, which is available on request for the convenience of applicants.

(ii) *Restrictions on issuance of Letter of Registration.* An application filed pursuant to subparagraph (i) hereof will be denied and no Letter of Registration as a
 9 Small Irregular Carrier will be issued to an applicant which has, or proposes to have, as owner, partner, officer, director, or stockholder holding a controlling interest, any person who was, or is connected in any such capacity with any Irregular Air Carrier, Noncertificated Cargo Carrier or Air Freight Forwarder, if the Letter of Registration or exemption privilege of such carrier or forwarder was suspended or revoked by the Board during the time of such connection, unless it has been shown to the Board by such applicant, and the Board finds, that the public interest and applicant's intention and ability to conform to the provisions of the Act and requirements thereunder will not be adversely affected by such relationship or former relationship. For the purpose of carrying out the intent of this provision, the Board may, before or after the issuance of a Letter of Registration, require the applicant to furnish information in addition to that required to be set forth in its application filed pursuant to subparagraph (i) hereof.

(iii) *Effective Period.* Each Letter of Registration of a Small Irregular Carrier shall become effective only upon the date specified therein and shall continue in effect until suspended, revoked or cancelled, or until the temporary privilege conferred by this paragraph (a) shall terminate

or otherwise cease to be effective with respect to such Small Irregular Carrier, whichever occurs first.

10 (iv) *Nontransferability of Letter of Registration.* A Letter of Registration shall be nontransferable and shall be effective only with respect to the person named therein.

(v) *Suspension of Letter of Registration.* Letters of Registration shall be subject to immediate suspension when, in the opinion of the Board, such action is required in the public interest, or when there exist circumstances which would constitute proper grounds for denial of an application if the carrier were not holding a Letter of Registration and were applying therefor. Letters of Registration shall be further subject to suspension upon complaint, or upon motion of any person showing an interest therein, or upon the Board's own initiative, after not less than 10 days' notice to the Small Irregular Carrier, but without hearing or further proceedings, for failure to comply with the provisions of the Act or with any order, rule or regulation issued thereunder, or with any term, condition or limitation of any authority issued thereunder. Such suspension shall continue until the Board finds that such suspended Small Irregular Carrier has complied with, or has submitted satisfactory evidence and assurances that it will comply with the provisions of the Act, or with such rules, regulations, orders, terms, conditions or limitations. Failure to seek reinstatement of a Letter of Registration suspended pursuant to the provisions of this paragraph within a period of 60 days after the effective date of such suspension shall automatically terminate all rights under such Letter of Registration.

11 (vi) *Revocation or Cancellation of Letter of Registration.*

(a) Letters of Registration shall be subject to revocation, after notice and hearing, for knowing and willful violation of any provisions of the Act or of any order, rule, or regulation issued under any such provision or of any

term, condition, or limitation of any authority issued under said Act or regulations, or for any cause which, at the time of revocation, would justify the Board in refusing to issue to the holder of such Letter a like Letter.

(b) The Letter of Registration of any Small Irregular Carrier shall be revoked without prejudice upon the filing by such carrier of a written request for cancellation; *provided*, that the Board may refuse to grant such request if any proceeding or action is pending in which the Small Irregular Carrier's authority may be subject to suspension or revocation action.

(c) In any case in which the Board has reason to believe that a Small Irregular Carrier has ceased to operate pursuant to the temporary exemption privilege conferred by this paragraph (a), the Board may, by registered letters mailed to the carrier at its last known address and to the designated agent of such carrier, request such carrier to advise the Board, within 60 days after receipt thereof, whether such carrier wishes to continue such operations or to have its Letter of Registration cancelled. Failure to reply within a period of 60 days after receipt thereof, or the return of such letters unclaimed, shall automatically terminate all rights under such Letter of Registration.

12 (b) *Large Irregular Carriers.*

(1) *Exemptions.* Except as otherwise provided in this section, each air carrier holding an effective Letter of Registration as a Large Irregular Carrier, as hereinafter defined, shall be temporarily exempted from the following provisions of Title IV of the Civil Aeronautics Act of 1938, as amended:

(i) Subsection 401(a), but only insofar as said subsection would otherwise prevent such Large Irregular Carrier from engaging in irregular interstate or overseas air transportation of persons or property, or in irregular foreign air transportation of property, as hereinafter defined.

(ii) Subsection 404(a); *provided*, however, that each such Large Irregular Carrier shall abide by those provisions of this subsection which require air carriers to provide safe service, equipment and facilities in connection with air transportation; and to establish, observe and enforce just and reasonable individual rates, fares and charges and just and reasonable classification, rules, regulations and practices relating to such air transportation.

(iii) Subsection 405(e).

(2) *Duration.* The temporary privilege conferred by this paragraph (b) shall terminate and cease to be effective with respect to each Large Irregular Carrier at 12:01 a. m. E. S. T., on [31 days after effective date]; *provided*, that any Large Irregular Carrier which before such time has on file with the Board pursuant to section 416(b) of the Act an application for an individual temporary exemption from Title IV of the Act extending to all or

part of the air transportation which such Large
13 Irregular Carrier is authorized to perform as of
[30 days after effective date] pursuant to the temporary exemption privilege conferred by this paragraph (b), may continue to exercise such privilege until, but only until, the date specified in the Board's order finally disposing of its application for individual exemption, or until its temporary privilege conferred by this paragraph (b) is suspended, revoked or cancelled as provided for in subparagraphs (4) and (5) of this paragraph, whichever shall be earlier.

(3) *Conditions to exercise of temporary exemption privilege.*

(i) *Necessity for Letter of Registration.* No person shall exercise the temporary exemption privilege conferred by this paragraph (b) unless there is in force with respect to such person a Letter of Registration issued by the Board, acknowledging that such person has been duly registered with the Board as a Large Irregular Carrier under the provisions of §292.1 of the Economic Regula-

tions, as amended, relating to irregular air transportation.

(ii) *Necessity of Board approval of certain owners or officials.* No Large Irregular Carrier shall have and retain as an owner, partner, officer, director or stockholder holding a controlling interest, any person who was, or is, connected in any such capacity with any Irregular Air Carrier, Non-certificated Cargo Carrier, or Air Freight Forwarder, if the Letter of Registration or temporary exemption privilege of such carrier or forwarder was subject to suspension action by the Board during the time of such connection, unless it has been shown to the
14 Board by such carrier, and the Board finds, that the public interest and the carrier's intention and ability to conform to the provisions of the Act and requirements thereunder will not be adversely affected by such relationship or former relationship. A carrier or forwarder shall be considered to be subject to suspension action within the meaning of this provision if it conducts unauthorized operations which subsequently form the basis for Board action looking toward the revocation or suspension of its Letter of Registration or its temporary exemption privilege, as the case may be.

(iii) *Prohibition against using same sales agent.* No Large Irregular Carrier shall have and retain any person as an agent or representative for the sale of air transportation between two points on the aircraft of such carrier if such person also acts, or at any time or upon any occasion (but not including any time or occasion prior to [effective date of amendment]) within the preceding 30 days has acted, as agent or representative for the sale of air transportation between such points on the aircraft of any other Irregular Air Carrier; and no Large Irregular Carrier shall have and retain as an agent or representative for the sale of air transportation on the aircraft of such carrier any person which at any time acted as an agent or representative for the sale of air transportation

between such points on the aircraft of two or more Irregular Air Carriers, unless it has been shown to the Board by such Carrier that the public interest and the carrier's intention and ability to conform to the provisions of the Act and requirements thereunder will not be adversely affected thereby.

(iv) *Prohibition against joint rates, fares or charges.* No Large Irregular Carrier shall establish, observe or enforce any joint rates, fares or charges with any other air carrier.

15 (4) *Suspension of Letter of Registration.* Letters of Registration shall be subject to immediate suspension when, in the opinion of the Board, such action is required in the public interest. Such suspension shall continue until the Board finds that such suspended Large Irregular Carrier has complied with, or has submitted satisfactory evidence and assurances that it will comply with, the provisions of the Act, or with such rules, regulations, orders, terms, conditions or limitations. Failure to seek reinstatement of a Letter of Registration suspended pursuant to the provisions of this paragraph within a period of 60 days after the effective date of such suspension shall automatically terminate all rights under such Letter of Registration; *provided*, that in the case of a Letter of Registration suspended prior to [effective date of amendment], failure to seek reinstatement of such Letter of Registration prior to [date 60 days after effective date of amendment] shall automatically terminate all rights under such Letter of Registration.

(5) *Revocation or cancellation of Letter of Registration.*

(i) *Revocation.* Letters of Registration shall be subject to revocation, after notice and hearing, for knowing and willful violation of any provisions of the Act or of any order, rule, or regulation issued under any such provisions or of any term, condition or limitation of any authority issued under said Act or regulations.

(ii) *Cancellation on request.* The Letter of Registration of any Large Irregular Carrier shall be revoked without prejudice upon the filing by such carrier of a written request for cancellation; *provided*, that the Board may refuse to grant such request if any proceeding or action is pending in which the Large Irregular Carrier's Letter of Registration may be subject to suspension or revocation.

16 (iii) *Cancellation for non-use.* In any case in which the Board has reason to believe that a Large Irregular Carrier has ceased to operate pursuant to the temporary exemption privilege conferred by this paragraph (b), the Board may, by registered letter mailed to the carrier at its last known address and to the designated agent of such carrier, request such carrier to advise the Board, within 60 days after receipt thereof, whether such carrier wishes to continue such operations or to have its Letter of Registration cancelled. Failure to reply within a period of 60 days, or return of such letters unclaimed, shall automatically terminate all rights under such Letter of Registration.

(6) *Interlocking Relationships.* If an application by any Large Irregular Carrier for approval of an interlocking relationship in existence on [effective date of the amendment] and heretofore exempt from the provisions of section 409(a) is filed with the Board on or before [30 days after effective date], such carrier may retain the officer, director, member or stockholder involved in such relationship pending final disposition by the Board of said application, and such relationship is hereby approved pending such final disposition.

(7) *Operational Limitations for Large Irregular Carriers.* Large Irregular Carriers shall not engage in the foreign air transportation of persons, and are not granted any exemption by this regulation from the provisions of the Civil Aeronautics Act of 1938, as amended, with re-

spect to such foreign air transportation of persons.

17 (c) *Non-Applicability.* This section shall not apply to any air carrier authorized by a certificate of public convenience and necessity to engage in air transportation, to Alaskan Air Carriers, to operations within Alaska, or to any noncertificated air carrier engaged in air transportation pursuant to special or individual exemption by the Board or pursuant to exemption created by any other section of the Economic Regulations.

(d) *Definitions.*

(1) *"Irregular" Air Transportation.* For the purpose of this section, the term "irregular", as applied to interstate, overseas or foreign air transportation of persons or property, shall mean a service in which the carrier does not hold out to the public, expressly or by course of conduct, that it operates one or more aircraft between designated points, or within a designated point, regularly or with a reasonable degree of regularity upon which aircraft it accepts for transportation, for compensation or hire, such members of the public as apply therefor or such property as the public offers. Such service shall not be deemed to be irregular unless the air transportation services offered and performed by the carrier are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between, or within, such designated points. Within the meaning of this definition a "point" shall mean any airport or place where aircraft may be landed or taken off, including the area within a 25-mile radius of such airport or place.

18 (2) *Small Irregular Carrier.* The term "Small Irregular Carrier" shall mean any air carrier which (i) directly engages in irregular air transportation of persons or property as defined in subparagraph (1) above, (ii) does not hold a certificate of public convenience and necessity under section 401 of the Act, as amended, and (iii) does not use in its transportation services aircraft units having a gross take-off weight in excess of 10,000 pounds for any one unit or 25,000 pounds for the total of

such units (disregarding units of 6,000 pounds or less).

(3) *Large Irregular Carrier*. The term "Large Irregular Carrier" shall mean an air carrier which holds a Letter of Registration issued to it as a Large Irregular Carrier pursuant to application therefor filed with the Board before August 6, 1948, and not revoked or cancelled as of [effective date of this amendment].

(4) *Irregular Air Carrier*. The term "Irregular Air Carrier" shall mean any air carrier which falls within the definition of either a Large or Small Irregular Carrier as defined above.

(3) *Separability*. If any provisions of this section or the application thereof to any air transportation, person, class of persons, or circumstances is held invalid, the remainder of the section and the application of such provisions to other air transportation, persons, classes of persons, or circumstance shall not be affected thereby.

(52 Stat. 984 and 1004, as amended; 49 U. S. C. 425a and 496b).

* * * *

21

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD

Washington 25, D. C.

Economic Regulations

DRAFT RELEASE NO. 33-B

Dated: January 26, 1949

IRREGULAR AIR CARRIERS
AMENDMENT AND PARTIAL REPEAL OF
IRREGULAR AIR CARRIER EXEMPTION
SUPPLEMENTAL NOTICE OF ISSUES FOR
ORAL ARGUMENT ON FEBRUARY 15, 1949

By supplement dated January 12, 1949 to Draft Release No. 33, which is a proposed revision of §292.1 of the Economic Regulations, the Board set down for oral argument consideration of the proposed revision at 10:00 A. M. on Tuesday, February 15, 1949, in Room 5042, Depart-

ment of Commerce Building, Washington, D. C. and advised that there would shortly be circulated a statement of the issues to which oral argument should be directed.

The relatively large number of persons expected to ask to be heard, as well as some apparent misunderstanding as to the purpose and scope of the proposal, make it desirable to advise interested persons of the issues on which the Board is principally interested in hearing oral argument. The Board believes that this specification of issues will assist the parties to make the best and most productive use of the time available for the argument. It is stressed that such specification involves only the oral argument and not the written comments, which may be filed on or before February 1, 1949, and that, accordingly, ample opportunity exists to present written argument on any subsidiary or additional issues.

22 The principal issue raised by the proposed revision on which the Board desires oral argument concerns termination of the blanket exemption of the Large Irregular Carriers and substitution of a plan under which individual exemption orders would be granted to each Large Irregular Carrier which is able, through applications filed for that purpose, to make an appropriate showing under section 416 of the Act. Since each application would be acted upon on its merits after it is filed, the Board does not desire to hear argument on the merits of the irregular operations of any particular carrier. It does desire to hear argument on the question whether the Board should adopt the proposed plan of examining individual exemption applications, on the advantages and disadvantages of such a plan, and on suggestions for the improvement of the plan or the substitution of some other plan.

The proposed revision of §292.1 does not include any proposal to change the frequency and regularity of operations by an irregular carrier. Moreover, in this connection it should be noted that Interpretation No. 1 to §292.1 (re-

leased simultaneously with the proposed revision of §292.1 and containing illustrative examples of regular and irregular operations) is not such a proposal. It has already been adopted by the Board, is now in effect, and represents a clarification of, rather than a change in, the existing regulation. The Board at this time does not desire to hear oral argument, therefore, with respect to the frequency and regularity with which irregular carriers should be permitted to operate. By the same token the Board does not wish to hear argument on the issue of the desirability of regular "coach" service conducted by Irregular Air Carriers or other carriers, since that question is not put in issue by the proposed revision of §292.1.

23 In addition to the principal issue, the proposed revision would effect certain other changes raising issues on which the Board welcomes oral argument. These issues include the following:

1. Whether large irregular carriers should not now be required to establish and observe just and reasonable rates, fares, charges, rules, classifications and practices in connection with air transportation.

2. Whether such exemptions as are presently extended to large irregular carriers from sections 408, 409 and 412 of the Act should not be terminated and opportunity thus afforded for Board approval or disapproval of all the various relationships affected by such sections of the Act.

3. Whether irregular air carriers should not, in their employment of agents for the sale of transportation between any two points, be limited to persons who do not act as agents for any other irregular air carrier for the sale of transportation between such points and have not so acted within 30 days prior to such employment or who, if they have at any time previously so acted, have been specifically approved by the Board for such purpose.

4. Whether other changes in the existing regulation, as proposed in Draft Release No. 33 should be adopted.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan
M. C. Mulligan
Secretary

(SEAL)

* * * *

948

Regulations
Serial Number ER-142

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

Economic Regulations
Revision of §292.1
Adopted: April 13, 1949
Effective: May 20, 1949

CLASSIFICATIONS AND EXEMPTIONS
IRREGULAR AIR CARRIERS

The Civil Aeronautics Board, having circulated for comment a draft of proposed regulation amending §292.1 of its Economic Regulations relating to Irregular Air Carriers,¹ having considered written comments and oral argument thereon, and having also considered other data and information² available to the Board, finds as follows:

1. Since 1938 there has been in effect an exemption regulation of the Board which exempts Irregular Air Carriers from certain provisions of Title IV of the Civil Aeronautics Act. By various amendments since 1938 the extent

¹ The term "Irregular Air Carrier" as used herein is defined in paragraph (b) of §292.1 below.

² Such data and information include, among other things, the reports heretofore filed with the Board by the Irregular Air Carriers pursuant to §§292.1 and 202.1; data obtained in investigations made by the enforcement staff of the Board, particularly in Docket No. 3450, *In the Matter of the Investigation of the Activities and Practices of Large Irregular Carriers*; and formal and informal complaints filed against Irregular Air Carriers.

of economic regulation of such carriers has been gradually extended by the Board. The last general revision of the regulation occurred in May, 1947, at which time the Board found that both the protection of the public from improper practices by the noncertificated carriers and protection of the certificated carriers against unregulated competition required that additional regulatory provisions of the Act be made applicable to such carriers.

949 2. Experience since May of 1947 has demonstrated the need for further revision of the regulation, particularly with respect to the regulation of Large Irregular Carriers.³ Although a substantial number of Large Irregular Carriers have attempted to comply with the regulation and to meet such need as exists for irregular service, the regulation has served as a cloak for operations which are not within the intent and purpose of the regulation. Purporting to operate pursuant to the regulation some of the Large Irregular Carriers have conducted a substantial amount of regular operations, although the Board intended to authorize, and did authorize, only the rendition of irregular, limited and sporadic operations.

3. The temptation on the part of the Large Irregular Carrier which has no other means of livelihood to violate the regulation is very great, because such carrier tends for economic reasons to gravitate to the more lucrative routes and to operate with increasing regularity thereon in order to obtain full utilization of large aircraft. Route operations also permit the development of return loads, thus eliminating the less profitable flights to off-route points on which little or no payload is developed. To obtain sufficient utilization of large aircraft for an economical opera-

³ An Irregular Air Carrier is classified as a Large Irregular Carrier if the allowable gross weight of the aircraft units utilized in the transportation services of the carrier exceeds 10,000 pounds for any one unit or 25,000 pounds for the total of such units (disregarding units of 6,000 or less).

tion based on air transportation alone a substantial
 950 number of flights between definite points becomes
 necessary or desirable, even if only one or two large
 aircraft are being used. The need for route operations is
 further emphasized by operational factors, such as con-
 siderations of maintenance, overhaul, fueling and crew
 change for large aircraft.

4. The Large Irregular Carriers themselves have recog-
 nized the difficulty of attempting to conduct irregular serv-
 ices profitably with large aircraft. In the oral argument
 before the Board in this proceeding and in recent appli-
 cations for further exemption authority to conduct sched-
 uled operations the carriers have emphasized this diffi-
 culty. As stated by three recent applicants ⁴

“Large aircraft are costly and are expensive to main-
 tain and operate. Safety and other applicable regulations
 require substantial expenditures. Traffic in volume and
 regularity sufficient to support operations for such air-
 craft and under such conditions is inevitably traffic be-
 tween fairly large population centers. The number of
 such population centers is necessarily limited. [The ap-
 plicant] has found, over a period of some two and one-
 half years of operations as a non-scheduled carrier, that
 profitable operations under §292.1 are impossible if that
 regulation is strictly construed to limit seriously the num-
 ber of flights between named points.”

This is not an isolated statement of the difficulty, for it
 represents the view held and expressed in different ways
 by other Large Irregular Carriers.

5. In addition to regular operations conducted by in-
 dividual carriers, the operations of groups of such
 951 carriers have sometimes been conducted, either by
 agreement or by accident, in such a manner as to
 result in the holding out to the public, by means of adver-
 tisements and otherwise, of an integrated service offering

⁴ Dockets Nos. 3430, 3433 and 3434.

regular daily flights between specified points. This is most frequently accomplished through the device of a ticket or travel agent which represents a number of Large Irregular Carriers and advertises the fact that it sells tickets between designated points as agent for them. Even though the operations of a particular irregular carrier represented by the agent are irregular and infrequent, judicious spacing and arrangement of such flights by a sufficient number of carriers results in the operation of a frequent and regular service by the group. When the prospective passenger presents himself to the ticket agent through whom the service is offered, it is thus possible to accommodate the passenger on any date desired. Apart from the question of the legal propriety of such an arrangement, it is difficult to imagine an arrangement which more fully and completely violates the purpose and intent of §292.1.⁵

6. In addition to the regularity and frequency of operations, the wide-spread abuses noted by the Board in its findings attached to the revision of §292.1 in May of 1947 have not only continued, but in many respects have become greater and more flagrant. Rate cutting and departures from published tariffs have occurred, and have and will necessitate criminal action against agents and carriers whenever such practices become known to the Board.

952 7. On the basis, therefore, of our experience to date we conclude that large aircraft have a limited and restricted utility in meeting the need for irregular air service, and that carriers which purchase and attempt to use substantial numbers of such aircraft in irregular air service are likely to be driven by economic compulsion to the operation of a regular service on heavily travelled routes already being served by certificated carriers. Thus,

⁵ A proposal for further amendment of the regulation dealing with this and related devices used to evade the purpose of the regulation is being circulated to the public for comment concurrently herewith.

violation of law is brought about and the operations conducted go beyond the need for irregular services authorized by the Board. The Board has concluded, therefore, that the public interest requires that permission to use large aircraft in irregular air service should be granted only in cases in which (a) it is demonstrated that a need for irregular air service exists and will be met by the use of such aircraft, and (b) the Board can define the scope of the carrier's authority with more particularity than is possible under a blanket exemption authority such as §292.1. Accordingly, the Board finds that the repeal of §292.1, insofar as it pertains to Large Irregular Carriers, is required as soon as feasible without causing undue hardship.

8. The desirability of terminating the blanket exemption authority does not mean that there is not some need for the use of large aircraft in irregular air service, or that some of the Large Irregular Carriers have not been meeting such need under the present regulation. We believe, on the contrary, that a definite need exists for the use of such aircraft under proper circumstances. In view of the difficulty of complying with section 401 of the Act

with respect to services of this character, it may
 953 be that in particular cases and after examination of all of the facts the Board will find that enforcement of the Act would be an undue burden on the carrier and is not in the public interest. Accordingly, the Board finds that the regulation should provide that Large Irregular Carriers may file applications for individual exemption orders, and may continue to operate pursuant to §292.1 pending final determination of such applications. One of the factors which the Board would take into consideration in disposing of such applications is the extent to which the applicant had engaged in regular operations and had otherwise failed to comply with the requirements of the Act and the Board's regulations. In any orders of approval of individual exemption the Board will expect to insert

appropriate conditions relating to the term of the exemption, the nature of the services to be rendered, the areas within which such services may be furnished, and other appropriate conditions intended to confine the carrier to the rendition of an irregular service.

9. In harmony with the finding that exemption from section 401(a) should be withdrawn, the Board finds that the existing partial exemption of Large Irregular Carriers from §§408, 409(a) and 412 should be withdrawn and that such carriers should be made subject to said §§408, 409(a) and 412. In view of the scope of operations being conducted by the Large Irregular Carriers, the extent of violations, and the necessity of protecting the public interest and providing for uniform application of the Act to carriers conducting similar or comparable operations, the

954 Board is unable to find that enforcement of the provisions of §§408, 409(a) and 412 with respect to such carriers is not in the public interest, and, on the contrary, finds that enforcement of such provisions is in the public interest. For the same reasons the Board is unable to find that enforcement of those provisions of §404(a) which require each air carrier to establish, observe and enforce just and reasonable individual rates, fares, charges, classifications, rules, regulations and practices relating to interstate and overseas air transportation is not in the public interest, and, on the contrary, finds that enforcement of such provisions is in the public interest.

10. Certain additions and changes have been found necessary in the regulation as applied to Small Irregular Carriers alone. The combined or coordinated operations referred to in paragraph 5 above with regard to the Large Irregular Carriers would also violate the intent and purpose of the regulation if used by Small Irregular Carriers. Because the Small Irregular Carriers are exempt from certain sections of the Act, specifically §412, which would otherwise cover agreements to conduct combined operations, the Board finds it is necessary to directly prohibit

such agreements by the Small Irregular Carriers in order to prevent violation of the standard of irregularity established by the Regulation. Another change prohibits issuance of a Letter of Registration to a Small Irregular Carrier if certain owners or officials of the company were associated with certain classes of air carriers whose Letter of Registration was suspended or revoked unless the Board finds there will be no adverse effect on the applicant's operations. The Board finds the method by which
 955 certain individuals have evaded the effect of a suspension or revocation by altering the corporate form or by securing another letter should be prevented and that this regulatory means is appropriate for that purpose. An additional suspension provision has been placed in the Small Irregular Carrier section which allows the Board to suspend such Letters on 10 days' notice, but without hearing, for failure to file tariffs or reports. Such suspension continues until the Board finds that the Small Irregular Carrier has complied or will comply with the requirements. The Board finds such provision necessary because of the great difficulty which has been encountered in obtaining compliance with the requirements for filing reports and tariffs by Small Irregular Carriers.

11. Certain minor amendments, which apply to both Large and Small Irregular Carriers have been included in the amended Regulation. Most of these relate to termination or cancellation of outstanding Letters of Registration and are required in order that Letters of Registration shall not continue to be outstanding long after operations thereunder have ceased.

12. In view of the foregoing considerations, the present enforcement of the provisions of Title IV, except to the extent required in §292.1 below, would be an undue burden on Irregular Air Carriers by reason of the limited extent of, and the unusual circumstances affecting the operations of such carriers, and would not be in the public interest.

On the basis of the foregoing findings and pursuant to the Civil Aeronautics Act of 1938, as amended, particularly §§205(a) and 416(b) thereof, and for the purpose of providing for the economic regulation of services conducted on an irregular basis by noncertificated air carriers, the Civil Aeronautics Board hereby amends §292.1 (14 CFR 292.1) of the Economic Regulations in its entirety to read as follows, effective May 20, 1949:

(a) *Definitions.* The term "point" as used in this section shall mean any airport or place where aircraft may be landed or taken off, including the area within a 25-mile radius of such airport or place.

(b) *Classification.* There is hereby established a classification of noncertificated air carriers to be designated as "Irregular Air Carriers." The term "Irregular Air Carrier" means any air carrier which (1) directly engages in air transportation, (2) does not hold a certificate of public convenience and necessity under section 401 of the Civil Aeronautics Act of 1938, as amended, and (3) does not operate, or hold out to the public expressly or by course of conduct that it operates, one or more aircraft between designated points, or within a designated point, regularly or with a reasonable degree of regularity, upon which aircraft it accepts for transportation, for compensation or hire, such members of the public as apply therefor or such property as the public offers. No air carrier shall be deemed to be an Irregular Air Carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between, or within, such designated points.

(1) *Small Irregular Carriers.* Any irregular air carrier, as classified above, which does not use in its transportation services aircraft units having a gross take-off weight in excess of 10,000 pounds for any one unit or of 25,000 pounds for the total of such units (disregarding units of 6,000 pounds or less), shall be classified as a Small Irregular Carrier.

(2) *Large Irregular Carriers.* Any irregular air carrier other than a Small Irregular Carrier shall be classified as a Large Irregular Carrier; *provided*, that no air carrier shall be so classified unless it holds a Letter of Registration issued to it as a Large Irregular Carrier pursuant to application therefor filed with the Board before August 6, 1948, and not revoked or cancelled as of May 20, 1949.

(c) *Small Irregular Carriers.*

(1) *Exemptions.* Except as otherwise provided in this section, each Small Irregular Carrier, falling within the classification above, shall be temporarily exempt from the following provisions of Title IV of the Civil Aeronautics Act of 1938, as amended:

- (i) Subsection 401(a);
- (ii) Section 403;
- (iii) Subsection 404(a); *provided*, that Small Irregular Carriers shall abide by those provisions of this subsection which require air carriers to provide safe service, equipment and facilities in connection with air transportation;
- (iv) Subsection 404(b);
- 958 (v) Subsection 405(e);
- (vi) Subsection 407(b);
- (vii) Section 408;
- (viii) Subsection 409(a); and
- (ix) Section 412.

(2) *Duration.* The temporary exemption from any provision of Title IV of the Act provided by this paragraph (c) shall continue in effect only until such time as the Board shall find that enforcement thereof would be in the public interest or would no longer be an undue burden on the Small Irregular Carriers; *provided*, that upon such a finding as to any Small Irregular Carrier or class of Small Irregular Carriers, such exemption shall to that extent terminate with respect to such carrier or class of carriers.

(3) *Approval of certain interlocking relationships.* To the extent that any officer or director of a Small Irregular Carrier would, without prior approval of the Board, be in violation of any provisions of subsection 409(a) of the Civil Aeronautics Act of 1938, as amended, by reason of any interlocking relationship directly involving such Small Irregular Carrier, such relationship is hereby approved.

(4) *Effect on other statutes.* The temporary exemption hereinabove granted from section 408, 409(a) and 412 shall not constitute an order made under such sections, within the meaning of section 414, and shall not confer any immunity or relief from operation of the "antitrust laws," or any other statute (except the Civil Aeronautics Act of 1938, as amended), with respect to any transaction, interlocking relationship, or agreement otherwise within the purview of such section.

(5) *Conditions to exercise of temporary exemption privilege.*

(i) *Necessity for Letter of Registration.* No person shall exercise the temporary exemption privilege conferred by this paragraph (c) unless there is in effect with respect to such person a Letter of Registration issued by the Board, acknowledging that such person has been duly registered with the Board as a Small Irregular Carrier under the provisions of §292.1 of the Economic Regulations, as amended, relating to irregular air transportation. Any Small Irregular Carrier which holds a Letter of Registration issued to it, and not revoked or cancelled, prior to May 20, 1949, is not required to obtain another Letter of Registration.

(ii) *Prohibition against combined operations.* No Small Irregular Carrier shall make or maintain any agreement or arrangement with any other air carrier or air carriers with respect to the conduct of air transportation services which, if conducted by a single carrier, would take it out of the classification of an Irregular Air Carrier as set forth above.

(6) *Letters of Registration.*

(i) *Issuance of Letter of Registration.* Except as provided in subparagraph (ii) hereof, upon the filing of proper application therefor the Board will issue to any Small Irregular Carrier a Letter of Registration. Such application shall be certified as correct by a responsible official of such carrier, and shall contain the following information: (a) date; (b) name of carrier; (c) mailing address (d) location of principal operating base; (e) if a corporation, the place of incorporation, the name and citizenship of officers and directors and a statement that at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions; (f) if an individual or partnership, the name and citizenship of owners or partners; (g) the types and numbers of each type of aircraft utilized in air transportation. Such application shall be submitted in duplicate in letter form or on CAB Form No. 2789, which is available on request for the convenience of applicants.

(ii) *Restrictions on issuance of Letter of Registration.* An application filed pursuant to subparagraph (i) hereof will be denied and no Letter of Registration as a Small Irregular Carrier will be issued to an applicant which has, or proposes to have, as owner, partner, officer, director, or stockholder holding a controlling interest, any person who was or is connected in any such capacity with any Irregular Air Carrier, Non-certificated Cargo Carrier or Air Freight Forwarder, if the Letter of Registration or exemption privilege of such carrier or forwarder was suspended or revoked by the Board on account of acts or omissions which occurred during the time of such connection, unless it has been shown to the Board by such applicant, and the Board finds, that the public interest and applicant's intention and ability to conform to the provisions of the Act and requirements thereunder will not be adversely affected by such relationship or former relationship. For the purpose of carrying out the intent of this provision, the Board may, before or after

the issuance of a Letter of Registration, require the applicant to furnish information in addition to that required to be set forth in its application filed pursuant to subparagraph (i) hereof.

(iii) *Effective period.* Each Letter of Registration of a Small Irregular Carrier shall become effective only upon the date specified therein and shall continue in effect until suspended, revoked or cancelled, or until the temporary exemption privilege conferred by this paragraph (c) shall terminate or otherwise cease to be effective with respect to such Small Irregular Carrier, whichever occurs first.

(iv) *Nontransferability of Letter of Registration.* A Letter of Registration shall be nontransferable and shall be effective only with respect to the person or persons named therein.

(v) *Suspension of Letter of Registration.* Letters of Registration shall be subject to immediate suspension when, in the opinion of the Board, such action is required in the public interest. Letters of Registration shall be further subject to suspension, without hearing or other proceedings, for continuing failure to file tariffs or reports as required by provisions of the Act or any order, rule or regulation issued thereunder, after not less than 10 days' notice to the Small Irregular Carrier within which to comply with such requirement. Such suspension shall continue until the Board finds that such suspended carrier has complied with or submitted satisfactory evidence and

962 assurance that it will comply with the provisions of the Act or such rules, regulations or orders. Failure to seek reinstatement of a Letter of Registration suspended pursuant to the provisions of this subparagraph within a period of 60 days after notice to the carrier of such suspension shall automatically terminate all rights under such Letter of Registration; *provided*, that in the case of a Letter of Registration suspended prior to May 20, 1949, failure to seek reinstatement of such Letter of Registration, prior to July 20, 1949, shall automatically terminate all rights under such Letter of Registration.

(vi) *Revocation of Letter of Registration.* Letters of Registration shall be subject to revocation, after notice and hearing, for knowing and willful violation of any provisions of the Act or of any order, rule, or regulation issued under any such provision or of any term, condition, or limitation of any authority issued under said Act or regulations, or for any cause which, at the time of revocation, would justify the Board in refusing to issue to the holder of such Letter a like Letter.

(vii) *Cancellation of Letter of Registration.*

(a) The Letter of Registration of any Small Irregular Carrier shall be cancelled without prejudice upon the filing by such carrier of a written request for cancellation; *provided*, that the Board may refuse to grant such request if any proceeding or action is pending in which the Small Irregular Carrier's Letter of Registration may be subject to suspension or revocation.

(b) In any case in which the Board has reason to believe that a Small Irregular Carrier has ceased to
 963 operate pursuant to the temporary exemption privilege conferred by this paragraph (c), the Board may, by registered letters mailed to the carrier at its last known address and to the designated agent of such carrier, if any, request such carrier to advise the Board, within 60 days after receipt thereof, whether such carrier wishes to continue such operations or to have its Letter of Registration cancelled. Failure to reply within a period of 60 days after receipt thereof, or return of such letters unclaimed, shall automatically terminate all rights under such Letter of Registration.

(d) *Large Irregular Carriers.*

(1) *Exemptions.* Except as otherwise provided in this section, each Large Irregular Carrier, falling within the classification above, shall be temporarily exempt from the following provisions of Title IV of the Civil Aeronautics Act of 1938, as amended:

(i) Subsection 401(a);

(ii) Subsection 404(a); *provided*, however, that each such Large Irregular Carrier shall abide by those provisions of this subsection which require air carriers to provide safe service, equipment and facilities in connection with interstate and overseas air transportation; and to establish, observe and enforce just and reasonable individual rates, fares and charges and just and reasonable classifications, rules, regulations and practices relating to such air transportation.

(iii) Subsection 405(e).

964 (2) *Duration*. The temporary exemption conferred by this paragraph (d) shall terminate and cease to be effective with respect to each Large Irregular Carrier at 12:01 a.m., E.S.T., on June 20, 1949; *provided*, that any Large Irregular Carrier which before such time has on file with the Board pursuant to section 416(b) of the Act an application for an individual exemption from Title IV of the Act extending to all or part of the air transportation which such Large Irregular Carrier is authorized to perform as of June 19, 1949, pursuant to the temporary exemption conferred by this paragraph (d), may continue, except during any such time as its Letter of Registration may be suspended, to exercise such privilege until, but only until, the date specified in the Board's order finally disposing of its application for individual exemption, or until its Letter of Registration is revoked or cancelled, whichever shall be earlier. Suspension of the Letter of Registration of a Large Irregular Carrier shall not render such carrier ineligible to file an application for individual exemption hereunder.

(3) *Condition to exercise of temporary exemption privilege*. No person shall exercise the temporary exemption privilege conferred by this paragraph (d) unless there is in effect with respect to such person a Letter of Registration issued by the Board, acknowledging that such person has been duly registered with the Board as a Large Irregular Carrier under the provisions of §292.1 of the

Economic Regulations, as amended, relating to irregular air transportation.

965 (4) *Nontransferability of Letter of Registration.* A Letter of Registration shall be nontransferable and shall be effective only with respect to the person or persons named therein.

(5) *Suspension of Letter of Registration.* Letters of Registration shall be subject to immediate suspension when, in the opinion of the Board, such action is required in the public interest.

(6) *Revocation of Letter of Registration.* Letters of Registration shall be subject to revocation, after notice and hearing, for knowing and willful violation of any provisions of the Act or of any order, rule, or regulation issued under any such provisions or of any term, condition or limitation of any authority issued under said Act or regulations.

(7) *Cancellation of Letter of Registration.*

(i) The Letter of Registration of any Large Irregular Carrier shall be cancelled without prejudice upon the filing by such carrier of a written request for cancellation; *provided*, that the Board may refuse to grant such request if any proceeding or action is pending in which the Carrier's Letter may be subject to suspension or revocation.

(ii) In any case in which the Board has reason to believe that a Large Irregular Carrier has ceased to operate pursuant to the temporary exemption conferred by this paragraph (d), the Board may, by registered letters mailed to the carrier at its last known address and to the designated agent of such carrier, if any, request such carrier to advise the Board, within 60 days after receipt thereof, whether such carrier wishes to continue such
966 operations or to have its Letter of Registration cancelled. Failure to reply within a period of 60 days after receipt thereof, or return of such letters unclaimed, shall automatically terminate all rights under such Letter of Registration.

(8) *Interlocking Relationships.* If an application by any Large Irregular Carrier for approval of an interlocking relationship in existence on May 20, 1949, and heretofore exempt from the provisions of section 409(a) is filed with the Board on or before June 20, 1949, such carrier may retain the officer, director, member or stockholder involved in such relationship pending final disposition by the Board of said application, and such relationship is hereby approved pending such final disposition.

(9) *Operational limitations for Large Irregular Carriers.* Large Irregular Carriers shall not engage in the foreign air transportation of persons, and are not granted any exemption by this regulation from the provisions of the Civil Aeronautics Act of 1938, as amended, with respect to such foreign air transportation of persons.

(e) *Non-Applicability.* This section shall not apply to any air carrier authorized by a certificate of public convenience and necessity to engage in air transportation, to Alaskan Air Carriers, to operations within Alaska, or to any noncertificated air carrier engaged in air transportation pursuant to special or individual exemption by the Board or pursuant to exemption created by any other section of the Economic Regulations.

(f) *Separability.* If any provisions of this section or the application thereof to any air transportation, person, class of persons, or circumstances is held invalid, the remainder of the section and the application of such
 967 provisions to other air transportation, persons, classes of persons, or circumstance shall not be affected thereby.

(g) *Past Violations.* All those provisions of this section in effect prior to this amendment which are included in the amendment without substantial change are hereby affirmed and continued in effect and all such provisions are intended to speak from the time of their first enactment. All references to violations of the Board's Regulations include any violations at any time of the provisions of this section as then in effect, and this amendment shall

in no way affect any pending enforcement proceeding or action, or any enforcement action taken subsequent to the effective date of this amendment with respect to violations which occurred prior to such effective date.

(205, 409, 416; 52 Stat. 984, 1002, 1004; 49 U. S. C. 425, 489, 496)

By the Civil Aeronautics Board:

/s/ M. C. Mulligan
M. C. Mulligan
Secretary

(SEAL)

972 CIVIL AERONAUTICS BOARD
WASHINGTON 25, D. C.

FOR RELEASE:
IMMEDIATE

April 18, 1949

CAB-49-27

CAB Issues New Regulations for Irregular Air Carriers

The Civil Aeronautics Board today issued new regulations for irregular air carriers, and proposed additional regulations, designed to bring the operations of this type of air carrier under closer supervision of the Board.

In a statement accompanying the revision of Section 292.1 of the Economic Regulations, which was adopted with an effective date of May 20, 1949, the Board said that experience had demonstrated the need for such revision. It stated that "although a substantial number of large irregular carriers have attempted to comply with the regulation, . . . (it) has served as a cloak for operations which are not within the intent and purpose of the regulation, . . . The temptation on the part of the Large Irregular Carrier which has no other means of livelihood to violate the regulation is very great, because such carrier tends for economic reasons to gravitate to the more lucrative routes and to operate with increasing regularity

thereon in order to obtain full utilization of large aircraft."

One of the major changes effectuated by the new regulation is termination of the existing blanket exemption for large irregular air carriers. The new regulation provides that each large irregular carrier, in order to continue its operations, must file with the Board within 30 days from the effective date of the regulation an application for an individual exemption from certain provisions of the Civil Aeronautics Act. The carrier may then continue to operate while the Board is considering its application.

973 Instructions are to be issued shortly on the proper form and content of the applications for individual exemptions. The aim will be to have each application set forth the precise scope of the operating authority requested. Relevant material contained in reports already on file with the Board will be treated as part of the application, and voluminous supporting material need not accompany the applications when filed. Except for continued failure to comply with reporting requirements under the regulation by the applicants, no application will be denied by the Board because of deficiency of supporting factual data, without first affording the applicant opportunity to supplement its application.

The amendment of §292.4, concurrently adopted with the revision of 292.1, has eliminated in the case of irregular carriers the requirement of serving upon interested persons notice of any application for an exemption, a requirement they would find impossible to meet where the exemption relates to service between indeterminate points.

The Board found that the public interest required that permission to use large aircraft in irregular air service be granted only in cases in which "(a) it is demonstrated that a need for irregular air service exists and will be met by the use of such aircraft, and (b) the Board can define the scope of the carrier's authority with more particularity than is possible under a blanket exemption au-

thority." It was also pointed out that one of the factors which the Board would take into consideration in disposing of applications for exemption is the extent to which the applicant has engaged in regular operation or has otherwise failed to comply with the requirements of the Act and the Board's regulations. In orders approving
 974 any individual exemption, the Board said, it would expect to insert appropriate conditions as to the term of the exemption and the nature of the services, and to define areas within which such services may be furnished, as well as apply other appropriate conditions intended to "confine the carrier to the rendition of an irregular service."

The new regulation also withdraws the previous exemption of Large Irregular Air Carriers from section 408 of the Act, providing for Board approval of mergers, consolidations, etc.; section 409, requiring Board approval of interlocking relationships; and section 412, requiring the filing of intercarrier agreements for Board approval. Large Irregular Air Carriers are required, under the new regulation, to comply with the provisions of these sections of the Act. In addition, the new regulation provides that Large Irregular Air Carriers will not only be required, as at present, to file tariffs with the Board, but will also be required, under section 404 of the Act, to "establish, observe, and enforce just and reasonable individual rates, fares, charges . . ."

Although the new regulation continues the existing blanket exemption for the Small Irregular Air Carriers (defined as any irregular air carrier which does not use aircraft units having a gross take-off weight in excess of 10,000 pounds for any one unit or of 25,000 pounds for the total of such units), it does affect them in certain other ways. It prohibits small irregulars from entering into or maintaining any agreements or arrangements to conduct combined operations. It also contains provisions designed to prevent individuals associated with an offending small irregular from circumventing enforcement of the

Act and the regulations by shifting into a position
 975 where he controls another such carrier which still
 has operating authority. Language tightening the
 provisions for suspension of a letter of registration for
 failure to file certain documents has been included in the
 new regulation to enable the Board to obtain compliance
 with the requirements of filing reports and tariffs by the
 small irregulars.

In a draft release issued for public comment at the same
 time as the revision of 292.1 was adopted, the Board pro-
 poses to require the large irregulars to reduce to writing
 and file with the Board their agreements or other arrange-
 ments with ticket agencies, brokers, or other passenger
 traffic soliciting or generating instrumentalities, and to
 file copies of all charters or leases of air craft. The
 draft release also proposes additional amendments to 292.1,
 one of which would require the large irregulars to issue
 and preserve tickets and certain other written evidence of
 transactions in air transportation, and another of which
 would prohibit any large irregular from making agree-
 ments or arrangements which would result in the conduct
 of regular operations, or the holding out to the public of
 such service, by the carrier or any combination or large
 irregulars between specified points.

968 UNITED STATES OF AMERICA
 CIVIL AERONAUTICS BOARD
 WASHINGTON, D. C.
 Economic Regulations
 DRAFT RELEASE NO. 38
 Dated: April 13, 1949

*Forms of Reports of Financial and Operating Statistics
 Reporting Requirements for Irregular Air Carriers*

Notice is hereby given that the Civil Aeronautics Board
 has under consideration the amendment of §§ 202.1(b),
 202.3 and 292.1 of the Economic Regulations. The pro-

posed amendments are designed to supply the Board with additional information concerning the operations of Large Irregular Carriers in their relations with ticket agencies, brokers or other traffic soliciting or traffic generating instrumentalities. The Board has found that the adequate enforcement of the Act and its regulations has been hampered through a lack of information in this area of Irregular Air Carriers' operations.

The Board proposes a regulation along the following lines:

1. Each Large Irregular Carrier will be required to reduce to writing and to file true and complete duplicate original copies of each contract, agreement, understanding and other working arrangement (including all amendments, modifications, or renewals, cancellations or terminations thereof) between itself and any other person with respect to the following subjects: (1) the furnishing of passengers or groups of passengers; (2) the making of arrangements for flights for the accommodation of passengers or groups of passengers; (3) the solicitation or generation of passenger traffic to be transported by a Large Irregular Carrier; or (4) the charter or lease of aircraft.

969 2. Each Large Irregular Carrier will be required to file with the Board copies of all advertisements, pamphlets, brochures or other publicity material and all announcements or notices it issues pertaining to its air transportation services. Each Large Irregular Carrier will also be required to obtain and file copies of all such material issued by any person with which it has a contract, agreement, arrangement or understanding which is required to be reduced to writing and filed with the Board as provided in 1. above. This amendment is intended to broaden the coverage of subparagraph (iv) of §202.1(b)(3) of the Board's Economic Regulations and to the extent that the existing provisions cover the same

requirements they will be superseded by the new amendment. The remaining paragraphs of §202.1 will not be changed.

3. Each Large Irregular Carrier will be required to preserve for a period of at least one year copies of all billings, invoices, receipts or other documents evidencing transactions pertaining to air transportation with any person furnishing such Large Irregular Carrier with passengers or groups of passengers or availing itself of the services of such Large Irregular Carrier for air transportation purposes whether by prearrangement or not. Each Large Irregular Carrier will also be required to preserve for a period of at least one year certain other records particularly the original tickets or passes issued to passengers, receipts, invoices, bills or cancelled checks pertaining to passenger-carrying operations. This amendment extends the coverage of §202.3 with respect to items listed to the extent they are not already covered by the first paragraph of the present §202.1(b)

970 4. It is also proposed to amend §292.1 to require that each Large Irregular Air Carrier (1) shall not transport passengers or groups of passengers furnished or made available to it by any person (other than through its own staff or facilities) unless the arrangement for soliciting and furnishing such passengers is reduced to writing; (2) shall issue tickets at the time of sale, or passes, for the transportation by air of each passenger carried by each Large Irregular Carrier, showing thereon the name of the carrier, the name and address of the passenger, the date of issue, the origin and destination of the flight, the date of sale, the amount paid by the passenger, and a validation or other acceptance thereon by the carrier; (3) shall receive payment from or make payment to any person furnishing passengers or groups of passengers for transportation only upon the basis of a bill, invoice, or other written instrument showing (a) the same information contained in tickets sold and (b) the amount of

commission and other compensation paid to or retained by such persons.

5. It is also proposed to amend §292.1 in order to clarify this section by clearly stating that a Large Irregular Carrier is prohibited from entering into any contract, agreement or other arrangement which has the effect of holding out to the public that, or creating conditions under which, aircraft of the Large Irregular Carrier or any combination of such carriers operate between designated points or within a designated point regularly or with a reasonable degree of regularity.

This amendment is proposed under the authority of §§ 205(a), 407 and 416 of the Civil Aeronautics Act of 1938, as amended.

Interested persons may participate in the proposed rule-making by submitting three copies of written data, views or arguments pertaining thereto, addressed to the Secretary, Civil Aeronautics Board, Washington 25, D. C. All relevant matter in communications received on or before May 20, 1949, will be considered by the Board before taking final action on the proposed rule.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan
M. C. Mulligan
Secretary

(SEAL)

* * * *

982 UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.
Economic Regulations
Amendment No. 1 to Part 242
Adopted: November 4, 1949
Effective: December 10, 1949

*Forms of Reports of Financial and Operating Statistics
Reporting Requirements for Irregular Air Carriers*

The existing requirements of Part 242 of the Economic Regulations furnish the Board with data concerning finances and flight operations by individual irregular air carriers, but do not provide the Board with sufficient data concerning the operations of large irregular carriers, in their relations with ticket agencies, brokers or other traffic soliciting or traffic generating instrumentalities.

The purpose of the present action amending Part 242 is to require filing with the Board of specified information pertaining to the air transportation services conducted by large irregular carriers in cooperation with other large irregular carriers or with agencies which handle arrangements for furnishing transportation by large irregular carriers. This information is required in order to provide the Board with more adequate means of enforcing the Act and existing regulations governing irregular operations under Part 291.

Interested persons have been afforded an opportunity to participate in the making of this amendment in connection with the Board's Draft Release No. 38 dated April 13, 1949, (14 FR 1895) and full consideration has been given to all relevant matter presented.

In consideration of the foregoing the Civil Aeronautics Board hereby amends Part 242 of the Economic Regulations (14 CFR 242) effective December 10, 1949, as follows:

1. By recodifying §§242.1, 242.2, 242.3, 242.4 and 242.5 as §§242.2, 242.3, 242.4, 242.5 and 242.6, respectively.

2. By adding a new §242.1 *Definitions* to read as follows:

“§242.1 *Definitions.*

“(a) *Agreement.* The term ‘agreement,’ as used in this Part, shall mean any oral or written agreement, contract, understanding, or arrangement, and any amend-

ment, revision, modification, renewal, extension, cancellation or termination thereof.

“(b) *Ticket Agent*. The term ‘ticket agent’ as used in this Part, shall mean any person, whether such person is another air carrier or is acting as a ticket agent, travel agent, travel bureau, broker, forwarder, or otherwise (other than a *bona fide* regular employee of the direct air carrier concerned), who for compensation or profit;

“(1) solicits, obtains, receives, or furnishes directly or indirectly passengers or groups of passengers for transportation upon aircraft of an irregular air carrier, or

“(2) procures or arranges for air transportation of passengers or groups of passengers upon aircraft of such an air carrier by charter, lease, or any other arrangement.”

3. By revising subparagraph (4) of §242.5(b) to read as follows:

“(4) *Agreements with ticket agencies*. True and complete copies of every agreement between a large irregular carrier and any ticket agent shall be submitted with the flight report if it pertains to any of the following subjects:

984 (a) The furnishing of passengers or groups of passengers for transportation by air.

(b) The making of arrangements for flights for the accommodation of passengers or groups of passengers.

(c) The solicitation or generation of passenger traffic to be transported by the large irregular carrier; or

(d) The charter or lease of aircraft.”

4. By adding a new subparagraph (5) to §242.5(b) to read as follows:

“(5) *Publicity material on large irregular carrier operations*. A copy of each advertisement, circular, pamphlet, brochure or other publicity material and a copy of each announcement or notice issued by a large irregular carrier during the preceding 3-month period and pertaining to any of its air transportation services for passengers shall be submitted with each flight report. Information shall be

furnished with respect to each item required to be submitted by this section showing, if published in a newspaper, magazine or other advertising medium, the place and date or dates of issue, and the name of the publication, or, if distributed otherwise, (such as circulars, bulletins, pamphlets or brochures) the dates, manner and extent of distribution."

(Secs. 205(a), 407; 52 Stat. 984, 1000, 49 U. S.C. 425, 487)

NOTE: The reporting requirements of this Regulation have been approved by the Bureau of the Budget in accordance with the Federal Reports Act of 1942.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan
M. C. Mulligan
Secretary

(SEAL)

985 UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.
Economic Regulations
Amendment No. 2 to Part 291
Adopted: November 4, 1949
Effective: December 10, 1949

Irregular Air Carriers

Part 291 as interpreted by the Board attempts to regulate the activities of large irregular carriers in such a way as to authorize only a rendition of irregular, limited and sporadic operations. Notwithstanding this limited authorization the Board has found that many of the large irregular carriers have engaged in a substantial amount of regular operations and other types of unauthorized activities. One of the means of conducting such operations has been through the use of a so-called ticket or travel agent which solicits business by representing that it sells tickets for travel by air between designated points on a regular or frequent basis.

The agent assembles groups of passengers who are furnished air transportation on a frequent and regular basis by several large irregular carriers acting under common arrangements with the ticket agencies. The service conducted by such large irregular carriers individually may meet the test of irregularity, but collectively their operations have in many instances been both frequent and regular. While the Board has always considered such combined arrangements and operations thereunder a violation of the purpose and intent of Part 291, the specific prohibition against such operations is now being made for the purpose of clarification.

The Board has also found that widespread violations of tariff and reporting requirements make necessary
986 more stringent regulation of the relationship between ticket agents and large irregular carriers.

The purpose of the proposed regulation is to facilitate bringing these arrangements under Board scrutiny and control by the following actions:

1. Limiting the scope of the exemption authority granted so as to exclude from such authority the transportation of passengers by large irregular carriers to whom tickets, or passes in appropriate cases, have not been issued. Air transportation of unticketed passengers will henceforth not be exempt from, and will constitute a violation of, section 401(a) of the Act.

2. Imposing as conditions to the continued holding of a letter of registration (a) a requirement that all agreements pertaining to the solicitation and generation of passenger traffic and the transportation of such passengers be reduced to writing; (b) a requirement that payments to or from persons furnishing passengers be made only on the basis of written bills or invoices containing specified information; and (c) a prohibition against entering into any agreement, arrangement, or understanding with or involving other air carriers if such arrangement would result in the holding out of air transportation services

which, if conducted by a single carrier, would take it out of the classification of an irregular air carrier. Breach of any of the foregoing conditions will hereafter constitute cause for revocation of the letter of registration of the carrier concerned and withdrawal of its operating authority.

Interested persons have been afforded an opportunity to participate in the making of this amendment in connection with the Board's Draft Release No. 38 dated April 13, 1949 (14 FR 1895) and full consideration has been given to all relevant matter presented.

987 In consideration of the foregoing, the Civil Aeronautics Board hereby amends Part 291 of the Economic Regulations (14 CFR 291) effective December 10, 1949, as follows:

1. By adding paragraph (c) to §292.1 *Definitions*, to read as follows:

“(c) *Agreement*. The term ‘agreement,’ as used in this Part, shall mean any oral or written agreement, contract, understanding, or arrangement, and any amendment, revision, modification, renewal, extension, cancellation or termination thereof.”

2. By adding paragraph (d) to §291.1 *Definitions*, to read as follows:

“(d) *Ticket agent*. The term ‘ticket agent’ as used in this Part, shall mean any person, whether such person is another air carrier or is acting as a ticket agent, travel agent, travel bureau, broker, forwarder, or otherwise (other than a *bona fide* regular employee of the direct air carrier concerned), who for compensation or profit;

“(1) solicits, obtains, receives, or furnishes directly or indirectly passengers or groups of passengers for transportation upon aircraft of an irregular air carrier, or

“(2) procures or arranges for air transportation of passengers or groups of passengers upon aircraft of such an air carrier by charter, lease, or any other arrangement.”

3. By amending §291.23 to read as follows:

988 §291.23. *Large Irregular Carriers; limitations and scope of exemption.*—The exemption accorded large irregular carriers by this Part shall not extend to the air transportation of persons hereinafter prohibited in this section.

(a) Large irregular carriers shall not carry persons in foreign air transportation.

(b) Large irregular carriers shall not carry in interstate or overseas air transportation persons who do not fall into one of the following categories:

(1) Persons to whom tickets of the carrier in the form prescribed by §291.24 have been sold and issued at the time of sale by the carrier or one of its regular employees; or,

(2) Persons who have been furnished by a ticket agent with whom the carrier has entered into a written agreement for the furnishing of passengers, and to whom tickets of the carrier in the form prescribed by §291.24 have been sold and issued by such ticket agent at the time of sale; or,

(3) Persons obtained from another air carrier pursuant to written agreement; or,

(4) Persons to whom the carrier is authorized to grant free or reduced rate transportation pursuant to the provisions of section 403 of the Act and Part 223 of this chapter, and to whom passes in the form prescribed by §291.24 have been issued; *Provided*, that no pass
989 need be issued for free or reduced rate transportation of persons pursuant to §223.2 of this chapter.¹

4. By renumbering §291.24 as §291.31, §291.25 as §291.32, and §291.26 as §291.33.

5. By adding a new §291.24 to read as follows:

“§291.24 *Form of tickets to be used.*—Each ticket issued by the carrier, or by its authorized ticket agent, shall have

¹ Tickets and passes issued hereunder must be preserved in accordance with Part 249 of the Economic Regulations.

printed thereon the name and address of the carrier, and shall provide appropriate spaces for, and shall have entered thereon, at the time of sale, the name and permanent address of the passenger, the date of sale, the date of flight, origin and destination points, and the fare actually paid by the passenger. Such tickets shall also be signed at the time of sale by a duly authorized officer or employee of the carrier or agent. On or after the date of flight, tickets shall be validated by the carrier in some appropriate manner on the face thereof to indicate that either the transportation service covered thereby has been rendered or appropriate refund has been made where no service or only a part of the air transportation service has been rendered. In those cases where the carrier is by law entitled to transport any person at a free or reduced rate a pass shall be issued to such person, with the exception of those persons described in §223.3 of this chapter, prior to departure of flight and taken up by the carrier at the destination point. Each such pass shall have printed thereon the name and address of the carrier, and shall contain on its face the name and address of the passenger, the date of the flight, origin and destination points, and shall indicate the status of the passenger entitling him to free or reduced rate transportation."

6. By adding a new §291.25 to read as follows:

"§291.25 *Large Irregular Carriers; conditions on operating authority; payments to or from ticket agents.*—As an express condition on the operating authority granted by this Part and the letters of registration issued hereunder, no large irregular air carrier shall accept payment from or make payment to any ticket agent furnishing passengers or groups of passengers for transportation by air except on the basis of a written bill, invoice, or other written statement showing:

(a) The information specified in §291.24 contained in tickets sold to passengers furnished by such ticket agent;

(b) The amount of commission or other consideration paid to, or retained by, such ticket agent in return for

services rendered in connection with the furnishing of transportation, including payment, allowance, or reimbursement for cash advances for crew expenses, flight expenses, communication services, advertising or any other service.

7. By adding a new section, §291.26 to read as follows:

“§291.26. *Large Irregular Air Carriers; conditions on operating authority—agreements with ticket agents.*—As express conditions on the operating authority granted by this Part and the letters of registration issued hereunder.

(a) Each agreement between a large irregular carrier and any ticket agent shall be reduced to writing and signed by all the parties thereto, if it relates to any of the following subjects:

991 (1) The furnishing of persons or groups of persons for transportation,

(2) The arranging for flights for the accommodation of passengers or groups of passengers,

(3) The solicitation or generation of passenger traffic to be transported by a large irregular carrier, or

(4) The charter or lease of aircraft.

(b) No large irregular carrier shall make or maintain any agreement, or participate in any arrangement, with or involving any ticket agent or air carrier with respect to the conduct or holding out of air transportation services by such carrier individually or by such carrier in combination, conjunction, or collaboration with another air carrier or carriers, where the collective air transportation service so agreed upon or arranged would, if conducted by a single carrier, take it out of the classification of an irregular air carrier as set forth in this part.

(Secs. 205(a), 416; 52 Stat. 984, 1004; 49 U. S. C. 425, 496)

By the Civil Aeronautics Board:

/s/ M. C. Mulligan
M. C. Mulligan
Secretary

(SEAL)

BRIEF FOR RESPONDENT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10495

ARROW AIRWAYS, INC., ET AL., PETITIONERS

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

ON PETITION FOR REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD

EMORY T. NUNNELEY, JR.,

General Counsel,

JOHN H. WANNER,

Associate General Counsel,

O. D. OZMENT,

*Attorney Civil Aeronautics Board,
Attorneys for Respondent.*

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED APR 12 1950

Joseph W. Stewart

CLERK

TABLE OF CONTENTS

	Page
Jurisdictional Statement	1
Counterstatement of the Case	4
A. The background of the Board's regulations and the procedure followed in their adoption	4
B. The requirements of the Board's regulations	16
Statutes and Regulations Involved	17
Questions Presented	18
Summary of Argument	18
Argument	21
I. The Board's regulations represent a reasonable exercise of the Board's statutory authority	21
A. The regulations are reasonable regulations not impairing petitioners' operating authority or unduly burdening them or altering the legal relationship already existing between petitioners and their ticket agents	21
B. The regulations are within the Board's statutory authority	29
II. Proper and appropriate procedures were followed in the adoption of the Board's regulations	33
A. Adequate notice was given to petitioners of the Board's intention to adopt its regulations	33
B. The regulations properly were adopted pursuant to rule-making procedures	35
Conclusion	40

TABLE OF CASES

<i>American Air Transport & Flight School, Inc., Noncertificated Operations</i> , Docket No. 3405, Opinion and Order Serial No. 3906, dated February 15, 1950	11, 27
<i>American Tel. & Tel. Co. v. United States</i> , 299 U. S. 232 (1936)	2
<i>Bi-Metallic Investment Co. v. State Board</i> , 239 U. S. 441 (1915)	38
<i>Bowles v. Willingham</i> , 321 U. S. 503 (1944)	38
<i>Cain Broker Application</i> , 2 M.C.C. 633 (1937)	25
<i>Civil Aeronautics Board v. Modern Air Transport</i> , 179 F. (2d) 622 (C.C.A. 2, 1950)	8
<i>Civil Aeronautics Board v. Modern Air Transport</i> , 81 F. Supp. 803 (S.D. N.Y., 1949) <i>aff'd.</i> 179 F. (2d) 622 (C.C.A. 2, 1950)	29
<i>Columbia Broadcasting System v. United States</i> , 316 U. S. 407 (1942)	2
<i>Copes Broker Application</i> , 27 M.C.C. 153 (1940)	25, 26
<i>Di Santo v. Commonwealth of Pennsylvania</i> , 273 U. S. 34 (1927)	31
<i>Edward Hines Trustees v. United States</i> , 263 U. S. 143 (1923)	31

Table of Cases—Continued

	Page
<i>Ex-Cell-O Corporation v. City of Chicago</i> , 115 F. (2d) 627 (C.C.A. 7, 1940)	31
<i>Forbes v. United States</i> , 125 F. (2d) 404 (C.C.A. 9, 1942)	3
<i>Gemsco, Inc. v. Walling</i> , 324 U. S. 244 (1945)	30
<i>Guisseppi v. Walling</i> , 144 F. (2d) 608 (C.C.A. 2, 1944), <i>aff'd</i> 324 U. S. 244 (1945)	39
<i>Hilton v. Forrestal</i> , 83 App. D.C. 44, 165 F. (2d) 251 (1948), <i>aff'd</i> 334 U. S. 322 (1948)	2
<i>Interstate Commerce Commission v. All American Bus Line</i> , 22 F. Supp. 525 (S.D. N.Y., 1937)	31
<i>Investigation of the Activities and Practices of Large Irregular Carriers</i> , Docket No. 3450	3
<i>Joint Anti-Fascist Committee v. Clark</i> , — App. D. C. —, 177 F. (2d) 79 (1949)	31
<i>Kirkland v. Charleston & Western Carolina Railway Company</i> , 79 S. C. 273, 60 S. E. 668 (1908)	27
<i>McBride v. McNally</i> , 243 Pa. 206, 89 Atl. 1131 (1914)	27
<i>McCall v. California</i> , 138 U. S. 104 (1890)	31
<i>Maibrun v. Hamburg-American S. S. Co.</i> , 77 F. (2d) 403 (C.C.A. 2, 1935)	27
<i>Martin v. United States</i> , 100 F. (2d) 490 (C.C.A. 10, 1939) <i>cert. den.</i> 306 U. S. 649 (1939)	23, 24
<i>National Broadcasting Co. v. United States</i> , 319 U. S. 190 (1943)	30
<i>Pacific States Box and Basket Co. v. White</i> , 296 U. S. 176 (1935)	3
<i>Pearson v. Walling</i> , 138 F. (2d) 655 (C.C.A. 8, 1943), <i>cert. den.</i> 321 U. S. 775 (1944)	39
<i>Prentis v. Atlantic Coast Line</i> , 211 U. S. 210 (1908)	38
<i>Sprunt & Son v. United States</i> , 281 U. S. 249 (1930)	31
<i>Standard Air Lines, Inc., Noncertificated Operations</i> , Docket No. 3357, Opinion and Order No. 2950, dated June 20, 1949	11, 27
<i>Sung v. McGrath</i> , 70 S. Ct. 445 (1950)	37
<i>Tauck Tours, Inc. Extension</i> , 49 M.C.C. 491 (1949)	25, 26, 27
<i>Twin City Milk Producers Assn. v. McNutt</i> , 122 F. (2d) 564, 123 F. (2d) 396 (C.C.A. 8, 1941)	40
<i>United States v. Morehead</i> , 243 U. S. 607 (1917)	2, 30
<i>United States v. Morton Salt Company</i> , 338 U. S. 632 (1950) ..	30
<i>United States v. Rock Royal Cooperative, Inc.</i> , 307 U. S. 533 (1939)	3
<i>United States Lines Co. v. Civil Aeronautics Board</i> , 165 F. (2d) 849 (C.C.A. 2, 1948)	31
<i>Walling v. McCracken County Peach Growers Assn.</i> , 50 F. Supp. 900 (W.D. Ky. 1943)	3
<i>White v. Norfolk & S. R. Co.</i> , 115 N. C. 631, 20 S. E. 191 (1894)	27
<i>Willapoint Oysters v. Ewing</i> , 174 F. (2d) 676 (C.C.A. 9, 1949) <i>cert. den.</i> 338 U. S. 860 (1949)	39
<i>Wylie Broker Application</i> , 2 M.C.C. 677 (1937)	25

III

STATUTES AND REGULATIONS

Administrative Procedure Act, 60 Stat. 237, *et seq.* 5 U.S.C. 1001,
et seq.:

Section 2(d)	1, 36
Section 2(e)	36
Section 4	39
Section 4(a)	33
Section 5	36
Section 10	2
Section 10(a)	2
Section 10(b)	2

Civil Aeronautics Act of 1938, 52 Stat. 973, *et seq.* 49 U.S.C. 401
et seq.:

Section 1(21)	7
Section 205(a)	29
Section 401(f)	30
Section 401(h)	30
Section 402(f)	30
Section 402(g)	30
Section 403(b)	26, 32
Section 407	30
Section 408	32
Section 408(c)	32
Section 409	32
Section 412	32
Section 416	4, 30, 36, 38
Section 902	36
Section 1002	30
Section 1006	1, 2
Section 1006(a)	2
Section 1006(c)	2
Section 1007	30

Civil Aeronautics Board Regulations: 14 C.F.R. 1 *et seq.*:

Section 202.1	9
Section 292.1	6, 7
Part 42.31	22
Part 242	9, 16
Part 291	16, 36

MISCELLANEOUS

10 Am. Jur., Carriers:

Section 1112	27
Sections 1230-1235	27

Attorney General's Manual on the Administrative Procedure Act... 35, 36

Interstate Commerce Act:

Section 203(a)(18)	25
1 U.S.C. 1	23

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10495

ARROW AIRWAYS, INC., ET AL., PETITIONERS

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

ON PETITION FOR REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD

BRIEF FOR RESPONDENT

JURISDICTIONAL STATEMENT

Petitioners are seeking review of two amendments to certain economic regulations of the Civil Aeronautics Board, adopted by the Board pursuant to the rule-making procedures specified by the Administrative Procedure Act. These regulations are not "orders" in the sense that they represent the final disposition of an adjudicatory administrative proceeding.¹ However, the regulations do represent final agency action reviewable by this Court at the instance of these petitioners under jurisdiction conferred upon the Court by section 1006 of the Civil Aeronautics Act and Sec-

¹ See the definition of "order" contained in Section 2(d) of the Administrative Procedure Act (5 U.S.C. 1001(d)), set forth at page 2 of petitioners' brief.

tion 10 of the Administrative Procedure Act. In other words, these regulations constitute "orders" to the extent that they are included within the generic term "order" as that term is used in section 1006 of the Civil Aeronautics Act.²

Although the regulations here involved are reviewable as "orders", the Court's reviewing jurisdiction in this case is much more limited than that which exists in cases involving review of Board orders entered solely upon the basis of evidence received in a formal hearing. If the Court should determine that the Board properly proceeded by rule-making methods, as we believe it must, the area of judicial review is very narrow. The Court may inquire only into the questions of whether the rule-making procedures of the Administrative Procedure Act were observed, and whether the regulations are reasonable and within the Board's statutory authority. *American Tel. & Tel. Co. v. United States*, 299 U. S. 232, 236, 237 (1936); *United States v. Morehead*, 243 U. S. 607, 613, 614 (1917); *Hilton v. Forrester*, 83 App. D. C. 44, 165 F. (2d) 251, 253 (1948), *aff'd* 334 U. S. 322

² Section 1006(a) of the Civil Aeronautics Act (49 U.S.C. 646(a)), provides in pertinent part

"Any order . . . issued by the Board under this Act . . . shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order."

Regulations are generally regarded as "orders" within the meaning of statutory review provisions. See *e.g.* the cases cited in *Columbia Broadcasting System v. United States*, 316 U.S. 407, 416-417 (1942). Aside from the many judicial precedents so holding, the fact that jurisdiction to review Board actions in non-adjudicatory or "non-record" cases is conferred upon circuit courts by section 1006 is demonstrated by the provisions of section 1006(c) which require the Board to certify and file with the Court "a transcript of the record, if any, upon which the order complained of was entered".

Further, the regulations here involved constitute final "agency action" within the meaning of section 10(a) of the Administrative Procedure Act (5 U.S.C. 1009(a)), reviewable pursuant to Section 10(b) by the relevant "special statutory review proceeding" provided in section 1006 of the Civil Aeronautics Act.

(1948); *Forbes v. United States*, 125 F. (2d) 404 (C.C.A. 9, 1942). Although required to file the docket of its rule-making proceeding with the Court, the Board is not required to demonstrate the necessity for the promulgation of its regulations or their reasonableness by findings of fact or by evidence of record herein. On the contrary, if any state of facts reasonably can be conceived to sustain these regulations, there is a presumption of the existence of that state of facts. Petitioners "must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary". *Pacific States Box and Basket Co. v. White*, 296 U. S. 176, 185 (1935); *United States v. Rock Royal Cooperative, Inc.*, 307 U. S. 533, 567, 568 (1939); *Walling v. McCracken County Peach Growers Association*, 50 F. Supp. 900 (W.D. Ky. 1943).

Although not required to support its regulations upon their merits with evidence of record herein, the Board nevertheless has filed a voluminous transcript with the Court to which references are hereinafter made in support of certain factual assertions.³ That transcript consists of the docket of the Board's public rule-making proceeding culminating in the adoption of the regulations here involved and related regulations, together with a transcript of the evidence adduced before an examiner of the Board in its *Investigation of the Activities and Practices of Large Irregular Carriers*, Docket No. 3450. This latter transcript, filed for the information of the Court and the use of the parties, contains the testimony of many ticket agents and officers of Large Irregular Carriers, including the principal officers of several of the petitioners, and discloses the nature of the activities of both agents and carriers and the relationships existing between them.

³ The Board has not certified its transcript as the exclusive record upon which its regulations were entered. Since these regulations were adopted pursuant to rule-making procedures, no such exclusive record exists. Further, since the burden of establishing facts is not on the Board, only procedural notices and Board regulations have been designated for printing on the Board's behalf in the joint appendix to briefs. The reference "App." refers to portions of that appendix, and the reference "Tr." refers to portions of the Board's transcript which have not been printed.

COUNTERSTATEMENT OF THE CASE

A. The background of the Board's regulations and the procedure followed in their adoption.

Since 1938, there has existed a classification of noncertificated air carriers authorized to engage in irregular operations in air transportation by authority of a general exemption regulation promulgated by the Board under authority of section 416 of the Civil Aeronautics Act (49 U. S. C. 496). The original exemption order permitting the operation of "nonscheduled" air transportation services was adopted shortly after the effective date of the Act and was designed and intended to permit operations by so-called "fixed base" operators with aircraft suitable for that type of operation.⁴ Carriers availing themselves of the exemption thus afforded were not required to register with the Board, to file tariffs, or otherwise to comply with the regulatory requirements of the Act.

After the conclusion of hostilities in the recent war, large transport type aircraft were made available to civilian buyers at reduced prices from war surplus and thousands of persons trained in aviation by the armed forces were returned to civilian life. Further, the general public interest in air transportation had been stimulated by the performance of military aircraft both in combat and in transporting vast quantities of supplies and personnel. The Board's exemption regulation adopted to meet conditions existing in 1938 had remained substantially unchanged. Accordingly, many persons availed themselves of the privilege afforded thereby, and began operations with large

⁴ Generally speaking, a "fixed base" operator is an aeronautical enterprise located at a given airport holding itself out to provide "charter" or "air taxi" service upon demand. Such service is generally provided in small aircraft also employed in other aeronautical activities such as flight training, crop dusting, etc. The Board's original regulation was designed to relieve these persons from the necessity and expense of prosecuting a certificate application for authority to conduct such sporadic air transportation services which were noncompetitive with the scheduled operations of the certificated air carriers.

transport aircraft, which operations purportedly were "nonscheduled".⁵ Many of these operations were in fact confined to those contemplated and authorized by the exemption regulation, and many such operations are still being conducted with large transport type aircraft. However, the exemption regulation was and is utilized unlawfully in many other instances as color of authority for the offering and performing of regular airline services between the same points with large transport type aircraft.⁶

In addition to regularity and representations of regularity in operations, certain Irregular Air Carriers also have engaged in other undesirable and destructive competitive practices. These activities have required the Board,

⁵ Although of no importance to the disposition of this case, it may be stated that the majority of the noncertificated carriers, including most of the petitioners herein, apparently did not regard the Board's exemption regulation as an interim operating authority pending determination of their certificate applications. Contrary to the inferences contained in petitioners' brief, petitioners did not file applications for certificates and avail themselves of the exemption privilege because of the length of time required for determination of their certificate applications. Of the seven carriers here involved, only two filed certificate applications prior to 1949, and both of these have since been dismissed by the Board for lack of prosecution (Peninsular Air Transport, Docket No. 2819, filed February 24, 1947, dismissed July 8, 1949; Modern Air Transport, Docket 3435, filed July 30, 1948, dismissed July 21, 1949). Of the remaining five carriers, two have never filed certificate applications with the Board (Central Air Transport and Federated Airlines) and the application of another also has been dismissed for lack of prosecution (Arrow Airways, Docket 3783, filed May 11, 1949, dismissed November 29, 1949). The remaining petitioners, Great Lakes and Trans-American, filed applications in April, 1949, and hearing has been held on these applications. (Dockets 3730 and 3737).

⁶ Because of the large seating capacity of transport type aircraft and the expense involved in maintaining and operating them, Large Irregular Carriers utilizing these planes only in air transportation services find it difficult to operate at a profit and at the same time observe the limitations upon their operating authority. (See App. 24A, 25A). This fact was known to such carriers at the time they began operations, not only because of their own knowledge of aviation but through repeated statements by the Board and its staff that the exemption regulation did not permit a sufficient volume of operations between the same points to develop any substantial amount of traffic.

both for the protection of the traveling public and the certificated air transportation system, to amend its regulation from time to time to bring the operations of Irregular Air Carriers under closer scrutiny and control, and to make applicable to those carriers various regulatory requirements of the Act from which they were previously exempt when it became apparent that such action was required in the public interest.

Effective June 10, 1947, the Board completely revised its exemption regulation, requiring for the first time that carriers desiring to avail themselves of the privilege conferred thereby obtain "Letters of Registration" from the Board. "Large Irregular Carriers", i. e., those carriers operating large transport type aircraft, were required to file and observe tariffs, and also were subjected to other pertinent regulatory requirements of the Act. Quarterly reports setting forth the actual flights operated by the carrier concerned were required to be filed with the Board. Provision also was made for revocation of the Letter of Registration of those carriers who knowingly and wilfully violated the Act and requirements thereunder (14 C. F. R. 292.1, 1947 supplement).

Notwithstanding the increased regulatory controls to which Irregular Air Carriers were thereby subjected, their operating authority remained virtually unimpaired. Prior to the revised regulation, such carriers had been authorized to engage in non-scheduled operations (both cargo and passenger) between any points they desired in interstate, overseas and foreign air transportation, except between points within Alaska.⁷ The revised regulation withdrew the

⁷Insofar as is here pertinent, "interstate air transportation" as defined by the Act consists of common carriage by aircraft between places in one State and places in another State of the United States, and between places within the same territory or possession of the United States. "Overseas air transportation" consists of such carriage between places in the United States and places in a territory or possession, or between places in different territories or possessions. "Foreign air transportation" consists of such carriage between places in the United States or one of its territories and

exemption theretofore afforded for foreign air transportation of persons, but continued to permit irregular operations otherwise unlimited as to points served, as does the present version of the regulation under which petitioners conduct operations (App. 30A-39A).

Further, the regularity of operations permitted, or the degree of irregularity in operations required under the revised regulation, continued and continues the same as that existing since 1938. In addition to the guidance afforded to Irregular Carriers by the express provisions of the regulation relating to regularity in operations,⁸ the Board in a series of orders and opinions beginning early in 1946 had established definite criteria by which the carriers could and may presently determine the extent of operations permitted between the same points. The Board's requirements in this respect have been summarized by the second circuit in a case involving one of these petitioners as follows:

“ . . . (1) flights between designated points, whether one or more per week, must be staggered as to the days of the week in successive weeks; (2) if more than one such flight is to be operated per week in successive weeks, not only must such flights vary as to the days of the week, but there must also be breaks in continuity of service for a week or approximately that period during which no flights are operated between these same

possessions and foreign points. See section 1(21) of the Act (49 U.S.C. 401(21)).

Because of transportation problems peculiar to Alaska, Irregular Air Carriers are not permitted to conduct operations between Alaskan points.

⁸ The revised regulation defined an Irregular Air Carrier as one who, among other things, . . . “does not hold out to the public, expressly or by a course of conduct, that it operates one or more aircraft between designated points . . . regularly or with a reasonable degree of regularity . . .”. The regulation further provided that “no air carrier shall be deemed to be an irregular air carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between . . . such designated points”. Section 292.1(b) (14 C.F.R. 292.1(b), 1947 supplement). Substantially the same definition has been carried over into the presently effective exemption regulation (App. 30A).

points; and (3) the flights must be of such infrequency as to preclude any implication of a uniform pattern or normal consistency of operations between the same two points.”⁹

Contrary to petitioners’ assertions herein both in brief and in argument upon their motion for stay, an Irregular Air Carrier is not prohibited from predetermining the dates upon which flights will be operated so long as its flights or representations respecting such flights, or both, do not result in an operation or representation of an operation in excess of the foregoing standards. As the operating officials of the petitioning carriers well know, they always have been and are presently permitted to advise their representatives and the public of the date upon which they will operate a flight a few days in advance of that date, and are at liberty to advertise such departure dates in the public press if they so desire. As a matter of fact, announcements of next departure dates habitually are made by the vast majority of the Irregular Air Carriers or the agents utilized by them are otherwise informed or are aware of such dates.¹⁰ While occasional instances arise in which a flight is operated which was not predetermined, these instances are rare. Operating requirements relating to large transport type aircraft and economic considerations preclude very many “spur of the moment” passenger flights with this type of equipment.

Despite the freedom of operation permitted of Irregular Air Carriers and the specific pronouncements by the Board designed for their guidance, many such carriers continued and even increased the practices which had required the Board to impose additional regulatory requirements upon them. Tariff violations were particularly flagrant, together with the offering and performing of regular operations between the same points. Further, many of these carriers

⁹ *Civil Aeronautics Board v. Modern Air Transport*, 179 F. (2d) 622, 625 (C.C.A. 2, 1950).

¹⁰ See e.g. Tr. 1095, 1096, 1112, 1113, 1124, 1131, 1157, 1159, 1217, 1370, 1388, 1436, 1437, 1912 for the general practice of the carriers in this respect, and the knowledge by ticket agents of specific departure dates. The references cited also disclose the practices of several of the petitioners.

resorted to or continued to employ various devices in an attempt to conceal their activities, and particularly the device of operating behind so-called independent ticket and travel bureaus.

For the purpose of securing information concerning the relationship existing between the carriers and ticket agents, and to aid in controlling the illegal operations being conducted by the carriers, the Board, effective with the report for the quarter ending June 30, 1948, required the carriers to include in their quarterly flight reports detailed information relating to their employment of ticket agencies. Specifically, the carriers were required to state whether any cargo or passengers were transported pursuant to arrangements with such traffic generating agencies, and to include in their reports either a memorandum of the oral agreement or a copy of the written contract existing between the carrier and the ticket agent with respect to such transportation. Information was required to be tabulated as to each such agreement showing, among other things, the basis of the compensation paid to agents, and the obligations and responsibilities of the parties in connection with the transportation furnished. 14 C.F.R. 202.1(3)(b)(iv), 1949 edition.¹¹

Notwithstanding all of the foregoing and increased enforcement activity on the part of the Board, regularity in operations and tariff violations continued, principally be-

¹¹ Most of the Irregular Air Carriers, including the majority of petitioners herein, have reported the ticket and travel agencies utilized by them as agents paid upon a commission basis, and have not contended in their reports that these agencies occupy any status other than what they purport to be, namely, the agents of the carriers who transport the passengers obtained by them. However, many of these reports have not been accurate, and field investigations have revealed that some carriers contend that no understanding or agreement exists between them and the agents, notwithstanding evidence to the contrary. Since most arrangements between carriers and agents are verbal, the requirements of the Board's regulations are easily avoided and have not served the purpose for which they were intended.

Former Section 202.1 of the Economic Regulations specifying the reporting requirements for carriers has been redesignated as Part 242 of the Economic Regulations.

hind the cloak of the so-called independent ticket agencies. Although the Board was quite well aware of the practices engaged in by many such carriers through the medium of investigations conducted by its staff, formal proceedings before it, and complaints received from other air carriers and the public, it nevertheless on August 11, 1948 instituted a formal investigation into the activities and practices of Large Irregular Carriers (Order Serial No. E-1864; Docket No. 3450).¹² Public hearings therein have been held in New York City, Los Angeles, Seattle, Miami and Washington. Evidence was adduced at these hearings concerning the manner in which certain Large Irregular Carriers conducted their operations, and particularly with reference to the manner in which so-called independent ticket agents were utilized by these carriers as a cloak for their illegal activities. These hearings, a transcript of which is before the Court, establish, among other things, the following facts of record:

Because of the heavy concentration of Large Irregular Carriers over selected routes, the competition existing between these carriers inevitably has led to widespread tariff violations.¹³ Carriers' tickets or exchange orders are sold in many instances for whatever sums can be obtained without regard to tariff rates.¹⁴ In some cases, the tariff rates are inserted upon such tickets or in the books of the carriers when in fact much lower rates are charged. Carriers on occasion have also instructed their agents and employees to

¹² By its regulation ER-130, dated August 6, 1948, the Board had provided that no further Letters of Registration would be issued to those applicants therefor desiring to conduct operations as Large Irregular Carriers.

¹³ The majority of violations committed by Irregular Air Carriers have resulted from operations between New York, Miami, and San Juan; between New York and points on the West Coast, particularly Los Angeles, San Francisco and Seattle; and between Seattle and points in Alaska. The concentration of carriers over these routes has resulted from the desire or economic necessity for participating in this lucrative "long-haul" traffic.

¹⁴ Tr. 1151, 1236, 1271. These and subsequent references to the transcript of testimony in Docket 3450 are not exhaustive but merely illustrative.

follow this practice for the stated purpose of avoiding detection of tariff violations.¹⁵ In other cases, the carriers purportedly pay large "commissions" to ticket agents whereas in fact the carriers transport passengers at a rate agreed upon between the agent and the carrier without reference to the price for which the agent sells tickets to the public, and the difference between the rate received by the carrier and its tariff rate is reflected on the carriers' records as "commission" paid to the agent.¹⁶ In certain instances, plane-load lots of passengers assembled by ticket agents are transported at an agreed rate for exclusive occupancy of the aircraft.¹⁷ Carriers who thus "charter" their aircraft to ticket agents contend that they are absolved from any responsibility for the fare extracted from the individual passenger.¹⁸ In still other instances, tickets of the carriers having the lowest filed tariff rate are sold and their tickets honored by other carriers having higher rates. When called to account for this practice, certain of the transporting carriers have contended that their aircraft on the particular flight involved have been operated under "lease" to the carrier whose tickets were sold, although subsequent investiga-

¹⁵ See Modern's instructions and practices in this respect. Tr. 1153, 1442, 1443, 1447, 1448.

¹⁶ See Tr. 1133, 1134, 1235, 1378, 1379, 1451, for the general indifference of carriers to tariff rates and the practice of transporting passengers at a rate per head agreed upon between the ticket agent and the carrier. The general industry practice in recording the difference between tariff rate and actual rate as "commission" is summarized in the following language by Mr. C. H. Smith, principal officer of the petitioner Modern:

"I hold that the tariffs as they are in operation today, all of the non-scheduled tariffs, with the original basis of maximum allowable for payment as commission, is so much paper, valueless. The rest becomes a matter of bookkeeping. In order to comply with your tariff, you just figure the difference between your tariff and the net amount paid and the rest is your commission payable to agents." Tr. 1270, 1271.

¹⁷ Tr. 1135, 1136.

¹⁸ The Board has rejected this contention. *Standard Airlines, Inc. Noncertificated Operations*, Docket No. 3357, Opinion and Order Number 2950, dated June 20, 1949; *American Air Transport and Flight School, Inc., Noncertificated Operations*, Docket No. 3405, Opinion and Order Number E-3906, dated February 15, 1950.

tion revealed that this latter carrier claimed to be unaware of the use thus made of its tickets and the existence of purported lease arrangements between the carriers.¹⁹

Since Irregular Air Carriers are prohibited from holding out or operating regular services, widespread use has been made of ticket agents to generate traffic through representations of regular service between the same points. These agents, each of which usually promotes traffic for several Large Irregular Carriers, and who often are set up in business by the carriers,²⁰ conduct extensive advertising in the name of the agency representing that regular service is available between the same points.²¹ This advertising in many instances is paid for by the carriers on whose behalf the agent is acting.²² The agents of course are usually careful to disclose the fact that they are "agencies" rather than carriers.²³

A great variety of "tickets" are issued by the agents. In some instances, the carriers' tickets or exchange orders are issued.²⁴ In most cases, however, the agent issues his own "exchange order".²⁵ These orders customarily contain a blank space for insertion of the carrier's name, and, as pe-

¹⁹ See the testimony of the president of Arrow Airways so contending set forth at Tr. 1614-1616. This contention should be viewed in the light of Arrow's practice of "lending" its name to other carriers to cover particular flights which the actual carrier was not authorized to perform. See Tr. 1651.

²⁰ See Tr. 1601 with reference to the activities of Arrow Airways in this respect.

²¹ Tr. 1105, 1106, 1213, 1224, 1428-1431, 1950.

²² See *e.g.*, Modern's payments for the advertising of its agent, Tr. 1274, and the large payments made by Airline Transport Carriers for agency advertising, Tr. 1952, 1953. It may also be stated that the cost of advertising is one of the factors taken into account in determining the amount of commission which will be paid to a particular agent. In other words, the carriers pay the cost of advertising in most instances either directly or indirectly.

²³ See pages 22 and 23 of the Yellow Pages of the current Washington Telephone Directory and the almost daily agency advertisements appearing in the New York Times and other New York newspapers.

²⁴ Tr. 1233.

²⁵ Tr. 1083, 1151, 1234, 1432.

tioners well know, usually contain language designed to inform the passenger that in the sale of such order the agency acts only as the agent of the transporting carrier. Carriers' tickets are often issued when such an order is presented. (See petitioners' brief, page 8). In other cases, the order is honored by the transporting carrier as a ticket. In still others, the carrier accepts the passengers upon a cash basis at so much per head, and does not accept a copy of the order issued, presumably to avoid detection of tariff violations.²⁶ Some of the agents book passengers for carriers predetermined to operate on a given day. Others assemble passengers without prior commitment for transportation, and then shop around for the carrier who will transport the passengers at the lowest rate.²⁷ Thus, a regular service is in fact offered and performed through the media of the ticket agencies, although the Board's regulation was intended to authorize and does authorize only the operation and holding out of irregular service.

Because of the foregoing practices, with resultant abuses to the traveling public and its adverse effect upon the certificated air transportation system, the Board on December 10, 1948 issued its Draft Release No. 33 (13 Fed. Reg. 7785, App. 6A-20A), proposing to terminate the blanket exemption theretofore afforded to Large Irregular Carriers, and to substitute therefor special exemptions in appropriate cases as determined by the Board. The Board also proposed to adopt a regulation which would prohibit Large Irregular Carriers from employing or accepting traffic from agents who also acted as agents for other carriers conducting operations between the same points (App. 11A). Thereafter on January 12, 1949, the Board by Draft Release 33-A (14 Fed. Reg. 370), extended the time within which it would receive written comments on its proposed regulation and also stated that it would hear oral argument thereon. By

²⁶ Tr. 1133, 1134.

²⁷ Tr. 1112, 1157. Although not of "record" herein, some 500 passengers were stranded at Newark Airport over the Christmas holidays because of the issuance by agents of "tickets" to more passengers than the irregular carriers could accommodate.

its Supplemental Draft Release No. 33-B, dated January 26, 1949 (14 Fed. Reg. 420, App. 20A-22A), the Board specified the issues upon which it desired to hear argument, one of which was

“Whether irregular air carriers should not, in their employment of agents for the sale of transportation between any two points, be limited to persons who do not act as agents for any other irregular air carrier for the sale of transportation between such points and have not so acted within 30 days prior to such employment or who, if they have at any time previously so acted, have been specifically approved by the Board for such purpose”. (App. 22A).

These releases, in addition to being published in the Federal Register, were mailed to all holders of Letters of Registration in accordance with established Board practice. Notwithstanding this fact, only two of the petitioners, Great Lakes Airlines and Trans-American Airways (Tr. 231 and 389), availed themselves of the opportunity to submit written comment thereon, and none of the petitioners herein appeared in oral argument before the Board.

After consideration of the comments and oral argument upon Draft Release No. 33, and after consideration of other matters within the knowledge of the Board, including the record made in the general investigation in Docket No. 3450, the Board by regulation adopted on April 13, 1949 (14 Fed. Reg. 1879, App. 23A-39A), again completely revised its exemption regulation. The blanket exemption theretofore granted to Large Irregular Carriers was terminated effective May 20, 1949, and such carriers were required to file application for individual exemption orders. “Grandfather” provisions were included in the regulation whereby holders of Letters of Registration could continue operations until determination of their applications for individual exemption. Petitioners herein presently are authorized to provide irregular services pursuant to these grandfather provisions.

The revised regulation did not contain the proposed restriction against the use of common ticket agents by Large

Irregular Carriers. However, in its findings accompanying the adoption of the new regulation, the Board stated

"In addition to regular operations conducted by individual carriers, the operations of groups of such carriers have sometimes been conducted, either by agreement or by accident, in such a manner as to result in the holding out to the public by means of advertisements and otherwise, of an integrated service offering regular daily flights between specified points. This is most frequently accomplished through the device of a ticket or travel agent which represents a number of Large Irregular Carriers and advertises the fact that it sells tickets between designated points as agent for them. Even though the operations of a particular irregular carrier represented by the agent are irregular and infrequent, judicious spacing and arrangement of such flights by a sufficient number of carriers results in the operation of a frequent and regular service by the group. When the prospective passenger presents himself to the ticket agent through whom the service is offered, it is thus possible to accommodate the passenger on any date desired. Apart from the question of the legal propriety of such an arrangement, it is difficult to imagine an arrangement which more fully and completely violates the purpose and intent of § 292.1.⁵"

As indicated in the footnote to the above quoted finding, the Board, concurrently with the adoption of its revised exemption regulation, on April 13, 1949 issued Draft Release No. 38 (14 Fed. Reg. 1895, App. 42A-45A) proposing to adopt the regulations involved in the present appeal and stating the substance of these regulations. A press release issued by the Board on April 18, 1949 (App. 39A-42A), also stated the substance of the proposed regulations. *None of the petitioners in this case availed themselves of the opportunity to comment upon the proposals contained in the draft release.* After consideration of those comments actually received from interested persons, the Board on November

⁵ A proposal for further amendment of the regulation dealing with this and related devices used to evade the purpose of the regulation is being circulated to the public for comment concurrently herewith". (App. 25A, 26A).

4, 1949 duly adopted its regulations Serial Numbers ER-153 and ER-154 for the reasons stated therein (App. 46A-53A). These regulations became effective on December 10, 1949, and were applicable to approximately ninety-five Large Irregular Carriers. By order dated March 14, 1950, the Court stayed the Board's regulations as to these seven petitioners pending review thereof.

B. The requirements of the Board regulations.

The regulations under review, although involving the same subject matter, consist of separate amendments to two existing Parts of the Board's Economic Regulations. Regulation Serial Number ER-154 (App. 48A-53A) is an amendment to the presently denominated Part 291 of the Economic Regulation (App. 30A), the general exemption regulation from which petitioners' operating authority is derived and by which petitioners are governed in the conduct of their operations. Regulation Serial Number ER-153 (App. 46A-48A) is an amendment to Part 242 of the Economic Regulations, which Part specifies the content and form of reports required of Irregular Air Carriers.

Regulation ER-154, the principal regulation here involved, prescribes the form of tickets which shall be used by Large Irregular Carriers. Such tickets are required to show upon their face the name and address of the carrier, and are required to have entered thereon at the time of sale the name and address of the passenger, the date of sale, the date of flight, origin and destination points, and the fare actually paid by the passenger. These tickets also are required to be signed by a duly authorized agent or employee, and thereafter to be validated by the carrier in some appropriate manner.

The regulation also defines "ticket agents" in substance as those persons, other than *bona fide* employees of the carrier concerned, who for compensation and profit solicit, obtain, or arrange for the transportation of passengers by Large Irregular Carriers, specifically including in such definition ticket and travel agents, travel bureaus, brokers,

and forwarders. The regulation further provides that it shall be an express condition on the operating authority of Large Irregular Carriers that agreements with ticket agents with respect to the providing and obtaining of passenger traffic to be transported by the carrier concerned be reduced to writing; and imposes the further condition that no such carrier shall enter into or participate in any agreement or arrangement with or involving any ticket agent or air carrier which would result in operations which, if conducted by a single carrier, would remove that carrier from the classification of an Irregular Air Carrier. The third condition is imposed that settlement of accounts between carriers and ticket agents shall be only upon written invoice showing the information contained in tickets sold by such agent to passengers and also showing the commission paid or retained by the agent. To further effectuate observance of these requirements, Regulation ER-154 also provides that the exemption heretofore accorded to Large Irregular Carriers shall not extend to the transportation of passengers obtained from agents with whom written contracts are not in force and shall not extend to those persons who have not been issued the transporting carrier's tickets.

Regulation ER-153 requires the filing with the Board of all contracts entered into between carriers and ticket agents, and further requires the submission with the carrier's quarterly flight report of all publicity material issued by the carrier during the reporting period.

STATUTES AND REGULATIONS INVOLVED

Petitioners in their brief have referred to many of the sections of the Civil Aeronautics Act of 1938 (52 Stat. 973), as amended (49 U. S. C. 401 *et seq.*, sometimes referred to herein as the Act), the Board's regulations adopted pursuant thereto, and the provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001 *et seq.*) to which references have been made herein. Other pertinent provisions of the Civil Aeronautics Act, the Administrative Procedure Act, and the Board's regulations are cited or quoted in their appropriate place in the text of this brief.

QUESTIONS PRESENTED

1. Whether the regulations here involved represent a reasonable exercise of the Board's statutory authority.
2. Whether proper and appropriate procedures were followed in the adoption of these regulations.

SUMMARY OF ARGUMENT

The Board's regulations do not withdraw any portion of petitioners' operating authority. Petitioners may continue to conduct precisely the same operations which formerly were permitted by them, the Board merely has prescribed the method in which those operations shall be conducted. Petitioners may continue to utilize the services of ticket agencies, and will be subjected to very little if any change in operating methods if they are in fact presently conducting lawful operations. Moreover, the Board by its regulations has not altered any existing legal relationships between carriers and agents. The so-called independent ticket agencies are in fact and law the agents of the carriers who transport the traffic obtained by them.

Actually very few additional regulatory requirements have been placed upon petitioners, and those requirements obviously are reasonable in the light of conditions existing in the Irregular Air Carrier field. Petitioners have heretofore been required to report both verbal and written agreements to the Board with respect to all traffic obtained from ticket agencies. To insure compliance with these reporting requirements the Board has now found it necessary to require all such agreements to be reduced to writing. Somewhat similarly, because the use of exchange orders has permitted and encouraged wholesale violations of law, the Board has required that passengers be transported only upon the basis of tickets issued in the carriers' name at the time of sale rather than upon the basis of exchange orders which are in fact the carriers' tickets.

The prohibition against the entering into agreements with ticket agents and other carriers whereby regular services between the same points are offered and performed by com-

bined operations of several irregular carriers is not considered to constitute an additional regulatory requirement. Conspiracies to evade the law have always been illegal, and the Board's regulations proscribe only such conspiracies. However, if this prohibition is regarded as an additional regulatory requirement, it nevertheless is a proper one required for the preservation of the certificated air transportation system.

The Board had ample statutory authority to adopt its regulations. The duty of enforcing the Act is placed upon the Board. That responsibility, coupled with the specific authority granted in the Act to make rules and regulations necessary to the proper discharge of its duties, empowers the Board to promulgate regulations designed to aid in enforcing the Act. The fact that the Board lacks statutory authority to regulate brokers does not invalidate its regulations. The regulations are addressed to air carriers and concern a subject matter over which the Board's jurisdiction cannot be successfully disputed. Any effect which those regulations have upon ticket agents is the incidental effect of all regulatory action upon persons who deal with regulated enterprises. Further, the fact that certain relationships between air carriers and persons operating ground facilities, including ticket agents, do not require Board approval does not indicate any Congressional intent that the Board cannot reach evasion of lawful requirements by carriers through the employment of ticket agents, nor are the Board's regulations inconsistent with the provisions of the Act relied upon by petitioners.

Ample and adequate notice of the Board's intention to adopt its regulations was given to petitioners and the entire industry. In addition to the provisions of Draft Release 38 which fully complied with the requirements of Section 4 of the Administrative Procedure Act, petitioners were afforded notice of the Board's proposals by the findings and statements contained in the revised regulations adopted pursuant to Draft Release 33 and by the Board's press release relating thereto. Petitioner's failure to participate in the Board's rule-making proceeding cannot be predicated

upon any lack of proper notice to them of the Board's intention to adopt precisely those regulations which it did in fact adopt.

The Board's regulations properly were adopted by rule-making procedures. Even if viewed as a modification or a withdrawal of a portion of petitioners' operating authority, the Board nevertheless was not required to proceed by adjudicatory methods. The Civil Aeronautics Act does not require notice or determination upon a record of any action respecting an operating authority granted by way of exemption, and the adjudicatory provisions of the Administrative Procedure Act accordingly in terms are inapplicable to any such Board action unless the requirements of due process compel a construction of the Civil Aeronautics Act to require an adjudicatory proceeding with reference to the particular such action concerned. Any modification which may have resulted in petitioners' operating authority by the Board's action in this case was occasioned by a determination of future regulatory policy applicable to the entire classification of carriers of which petitioners are members, a "quasi-legislative" determination. The Constitution does not require a hearing before an administrative agency prior to such a determination, the constitutional requirement of due process is satisfied by the protection against arbitrary action afforded by judicial review. Accordingly, neither the Administrative Procedure Act nor general principles of law required any procedure other than that actually employed by the Board in adopting its regulations, regardless of whether petitioners' operating authority was modified or a portion thereof withdrawn.

ARGUMENT

I. *The Board's regulations represent a reasonable exercise of the Board's statutory authority.*

A. *The regulations are reasonable regulations not impairing petitioners' operating authority or unduly burdening them or altering the legal relationships already existing between petitioners and their ticket agents.*

Counsel for the Board are of the view that the Board lawfully could have adopted and can adopt whatever regulations are required to prevent the circumvention of the certificate requirements of the Act and the other unlawful practices heretofore described, including regulations which prohibit carriers from accepting any traffic from so-called independent ticket agencies or regulations which sharply curtail or completely withdraw the exemption privilege under which petitioners' operations are conducted. However, the Board has neither prevented the carriers from utilizing the services of ticket agencies conducting legitimate agency activities nor actually modified or revoked any portion of their operating authority by the regulations presently before the Court, notwithstanding petitioners' assertions to the contrary. Petitioners may continue to conduct precisely the same operations heretofore authorized. The Board's regulations merely prescribe methods by which those operations shall be conducted which obviously are reasonable under the circumstances affecting petitioners' operations, and were designed for the purpose of discouraging and aiding in eliminating practices already regarded as illegal. To the extent that the Board's regulations may have modified petitioners' operating authority, however, counsel for the Board are of the further view that this modification was accomplished in a lawful and proper manner. (See *infra* pp. 35 to 40).

An examination of the Board's regulations in the light of requirements already in existence at the time of their adoption will reveal that very few additional regulatory requirements have been placed upon the carriers. Peti-

tioners have heretofore been required to file reports with the Board disclosing the substance of verbal understandings in force with ticket agents, and to file copies of those agreements actually reduced to writing. These requirements with respect to verbal agreements have either been ignored or not fully complied with. For the purpose of preventing further avoidance of these requirements and concealment of agreements, the Board has now required that all agreements be reduced to writing.

Somewhat similarly, because the issuance of exchange orders by ticket agents has resulted in wholesale violations of law, the Board has required that the carriers provide transportation only upon their own tickets issued by their employees or agents at the time of the sale of the transportation. These ticketing requirements are not unduly burdensome. The information required to be inserted on tickets, other than the price, must be obtained from the passenger for the purpose of preparing required passenger manifests.²⁸ This information customarily is obtained at the time of issuance of the ticket or exchange order, and the manifests usually are prepared from these transportation documents.²⁹ Since the purchase price also normally appears or should appear on tickets and exchange orders, the Board has not required tickets to reflect any information which differs from that normally obtained. The Board has required only that the carrier's tickets be issued initially rather than exchange orders. Some of the Large Irregular Carriers have consistently followed this practice, and certainly most established transportation systems, including

²⁸ Passenger manifests are required by Safety Regulations. See 14 C.F.R. 42.31, 1946 Supplement.

²⁹ Many ticket agents also prepare manifests and settlement of accounts often is made upon this basis. Petitioners' contention respecting the unreasonableness of the requirement that accounts be settled only upon the basis of written invoices clearly lacks merit, and reflects a lack of understanding of present industry practices. Apart from the fact that this method of settlement already is employed in most instances, this requirement represents normal business practice.

The requirement that publicity materials be filed with reports obviously is not unduly burdensome.

the certificated air carriers, provide transportation only upon their own tickets. Moreover, petitioners have informed the Court that they issue tickets upon presentation of an exchange order (petitioners' brief, p. 8). If so, then the carriers will not be put to any additional expense in printing tickets.

The specific prohibition in the regulation against regular services by combination of Large Irregular Carriers is not believed to constitute any additional regulatory requirement by the Board. Laws which prohibit conduct by a single person also prohibit the same conduct by persons acting in concert.³⁰ Further, arrangements whereby regular transportation services are provided through the medium of travel bureaus employing carriers not themselves authorized to provide such services have been determined to constitute a criminal conspiracy to violate the Motor Carrier Act. *Martin v. United States*, 100 F. (2d) 490 (C. C. A. 10, 1939) *cert. den.* 306 U. S. 649 (1939). The Board's regulations proscribe only conspiracies to violate the Civil Aeronautics Act and requirements thereunder. The Board expressly stated that its prohibition against the providing of regular services through combinations of carriers was made "for the purpose of clarification", and clearly indicated its view that such combinations constituted a violation of existing requirements (App. 49A). The plain terms of the regulation provide that

"No large irregular carrier shall *make or maintain* any *agreement*, or *participate* in any *arrangement*, with or involving any ticket agent or air carrier with respect to the conduct or holding out of air transportation services . . . by such carrier in *combination, conjunction, or collaboration* with another air carrier or carriers, where the collective air transportation service so *agreed upon or arranged* would, if conducted by a single carrier, take it out of the classification of an

³⁰ 1 U.S.C. 1 provides in pertinent part:

"In determining the meaning of any Act of Congress, unless the context requires otherwise—

"Words importing the singular include and apply to several persons, parties, or things. . .".

irregular air carrier. . .". (App. 53A, emphasis supplied.)

The italicized words are words of fixed legal meaning, and obviously prohibit only that which already was illegal—conspiracies to violate lawful requirements. True enough under general principles of law a carrier must take affirmative steps to insure against participation in such an arrangement and to avoid utilization of the services of those agents who hold out or provide regular services between the same points. See *Martin v. United States, supra*. If the pointing out by the Board in its regulation of what is believed to be existing law in this respect has the salutary effect of breaking up those arrangements already existing which are believed to be illegal and preventing further such arrangements, then the inclusion of this clarifying provision will have served its purpose. If the Board is mistaken in its view that its prohibition against regular services by combination of carriers is merely declaratory of existing law, the imposition of this prohibition nevertheless is required for the protection of the existing air transportation system, and, as hereinafter demonstrated, represents a lawful exercise of the Board's statutory authority.

Further, the Board has not attempted to convert, or converted, irregular carriers into regular carriers by requiring tickets to be sold for transportation to be provided on a day certain. As heretofore indicated in the Counterstatement, *supra*, page 8, the carriers usually predetermine the days upon which they will operate and make this date known to their agents. So long as this "scheduling" does not result in a regular service it is a permissible practice.

Petitioners' contentions that the Board is attempting to convert ticket agents who are the agents of passengers into carrier's agents are without merit. Further, even if the Board's regulations had that effect, this fact would not constitute any valid objection since the regulations are reasonable ones necessary to prevent circumvention of lawful requirements by carriers. Actually any *bona fide* agent or other person who acts solely as the agent of a particular passenger in the procurement of transportation from a

carrier or a carrier's agent may continue to do so. Moreover, whatever may be the status of the ticket agents here involved as "independent" agents or "brokers", these agents nevertheless act as the agents of the carriers in the sale of those tickets and exchange orders upon which the carriers provide transportation.

In determining whether a particular person is required to procure a broker's license pursuant to Part II of the Interstate Commerce Act before he may sell or make arrangements for transportation subject to that Act, the Interstate Commerce Commission applies the test of conflicting interests.³¹ If two or more competing carriers are represented and the agent may direct the traffic to the carrier of his choice, he is a "broker" and requires a license. If he sells tickets or arranges for transportation for one carrier or several non-competing carriers, he is the carrier's agent and does not require a broker's license. *Cain Broker Application*, 2 M. C. C. 633 (1937); *Wylie Broker Application*, 2 M. C. C. 677 (1937); see *Copes Broker Application*, 27 M. C. C. 153 (1940).³² If these tests are considered applicable to the instant situation, some of the agents here involved are "agents", and others are "brokers".

However, the fact that a motor carrier ticket agent is a "broker" does not destroy his status as an agent for the

³¹ Section 203(a)(18) (49 U.S.C. 303(a)(18)) defines "brokers" subject to the Interstate Commerce Act as

"... any person not included in the term 'motor carrier' and not a bona fide employee or agent of any such carrier, who or which, as principal or agent, sells or offers for sale any transportation subject to this chapter, or negotiates for, or holds himself or itself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts or arranges for such transportation."

³² The *Copes* case and the *Tauck* case subsequently cited are believed to be the leading I.C.C. cases dealing with the legal relationships existing between brokers and carriers, and set forth the views of the Commission with respect to the similar problems in its field. Significantly, the two dissenting Commissioners in the *Copes* case believed that all "commission agents" such as the ticket agents here involved were not "brokers" within the Motor Carrier definition, but agents of the carriers whom they represented.

carrier whose tickets he sells or with whom he arranges for transportation. *Tauck Tours, Inc. Extension*, 49 M. C. C. 491 (1949). Further, this agency relationship exists even though there has been no prior specific employment of the broker or request for his services. "The acceptance [of business] and payment [of commission] ratify all that has gone before." *Copes Broker Application*, *supra* at page 165.³³

Moreover, the Interstate Commerce Commission considers that the relationship of principal and agent exists between transporting carriers and "brokers" as to each passenger obtained from the public even though the broker assembles a group of such passengers without prior commitment from any carrier for transportation and thereafter shops around for the services of a carrier to provide transportation. This view is predicated largely upon the fact that brokers are

³³The Commission often refers to "brokers" as both agents of the public and agents of the carriers with whom they do business and so referred to the brokers involved in the *Copes* and *Tauck* cases. In those instances involving tours or the transportation of property, "brokers" habitually receive fees from both parties to the transaction for services rendered. However, it is not assumed that the Commission would regard the mere selling of a ticket by a "broker" as a service to the patron for which a fee could be exacted. On the contrary, such a practice would seem to constitute a clear tariff violation. Actually this problem is of no significance here since the ticket agents concededly receive compensation only from petitioners and other Large Irregular Carriers and not from the passengers obtained by them.

Whatever may be the law with reference to exacting a fee from the passenger in addition to the tariff price of the ticket, the Interstate Commerce Act prohibits brokers from "splitting commissions" with passengers and thus providing transportation at less than tariff rates. *Copes Broker Application*, *supra* at page 167. The Civil Aeronautics Act also specifically prohibits this practice by agents and brokers. Section 403(b) of the Act (49 U.S.C. 403(b)), provides in pertinent part that

"... no air carrier shall, in any manner, or by any device, directly or indirectly, or through any agent or broker, refund or remit any portion of the rates, fares, or charges" specified in effective tariffs.

The inclusion of "brokers" within the foregoing provision would seem to constitute a Congressional recognition that "brokers" are in fact agents of the carriers with reference to the transportation procured through them.

not themselves authorized to engage in motor carrier operations, and that to permit them to solicit transportation of a type which the carrier later utilized could not directly solicit or transport, or to permit the carrier to engage in such activities through the employment of brokers, would make a "mockery" of the certificate provisions of the Motor Carrier Act. *Tauck Tours, Inc. Extension, supra* at pages 497-498. The Board has announced a like ruling in the air transportation field based largely upon similar considerations. *Standard Air Lines, Inc., Noncertificated Operations*, Docket No. 3357, Opinion and Order Number 2950, dated June 20, 1949; *American Air Transport and Flight School, Inc., Noncertificated Operations*, Docket No. 3405, Opinion and Order Serial Number E-3906, dated February 15, 1950.

The foregoing views of both the Commission and the Board are supported by general case law relating to the status of travel bureaus and ticket agents as agents of carriers. A travel bureau selling the ticket of a steamship company does so as the agent of the company, and not of the passenger. *Maibrun v. Hamburg-American S. S. Co.*, 77 F. (2d) 403 (C. C. A. 2, 1935). Those persons to whom carriers' tickets are entrusted for sale are of course the agents of the carriers in their sale. See 10 *Am. Jur.* "Carriers", § 1230-1235 and the numerous cases cited therein. Further, where "charter arrangements" are entered into between surface carriers and persons not having carrier authority, the chartering organization or individual is regarded as the carrier's agent notwithstanding the fact that he may also be regarded as the agent of the passengers. *McBride v. McNally*, 243 Pa. 206, 89 Atl. 1131 (1914). This result also has been reached upon considerations of public policy which forbid the avoiding of liability by interposing third persons between carriers and the public, and the delegating of their franchise privileges to others. *Kirkland v. Charleston & Western Carolina Railway Company*, 79 S. C. 273, 60 S. E. 668 (1908); *White v. Norfolk & S. R. Co.*, 115 N. C. 631, 20 S. E. 191 (1894), 10 *Am. Jur.* "Carriers," § 1112.

In short, the ticket agents whom petitioners utilize in their activities and from whom they accept business are in law their agents. Apart from considerations of public policy which prevent public transportation enterprises from avoiding their responsibilities and obligations by interposing third persons between themselves and the public, the relationship of principal and agent exists between the Irregular Carriers and their ticket agents under strict agency principles. Certainly this relationship exists where the carriers' tickets are placed in the hands of the agents as is often the case. Further, the legal relationship between them cannot be altered by the device of substituting for tickets exchange orders in which the carriers' names are entered, the method of doing business presently employed by the agents and known and acquiesced in by the carriers. Moreover, the carriers are free to reject passengers tendered to them by agents if in the sale of the "ticket" the agent was not in fact acting as the carrier's agent, and the acceptance of such passengers certainly constitutes a ratification of the sale of the transportation.

Actually the employment of ticket agents by many Large Irregular Carriers represents a thinly veiled attempt to circumvent the law. As has been heretofore stated, some carriers have advanced funds to agents for the purpose of setting them up in business. The practice of payment of advertising costs incurred by agents is common. The agencies are in fact "commission agents", deriving their compensation solely from commissions paid by the carriers and reported as such to the Board.³⁴ The agents represent themselves to be only agents in most instances both by their advertising and by provisions contained in the exchange orders which they issue. The Board has not attempted to alter any legal relationships existing between

³⁴ The flight reports filed with the Board by the petitioners Arrow, Great Lakes, Trans-American and Modern for the last quarter of 1949 all list the agents utilized by them and the percentage of commission paid. No contention is made in these reports that the agents employed are anything other than the carriers' agents.

carriers and ticket agents but on the contrary has required only an affirmative recognition of the relationship which always has existed.³⁵

From all of the foregoing it is apparent that the Board's regulations are reasonable and appropriate to the situation which they were designed to meet. Compliance with these regulations will not be unduly burdensome upon the carriers, will not alter existing legal relationships, or require any substantial change in the operating methods presently employed by carriers presently conducting lawful operations.

B. The regulations are within the Board's statutory authority.

The Board has the usual rule-making and related powers conferred by Congress upon regulatory agencies. Specifically, the Board by section 205(a) of the Act (49 U. S. C. 205(a)) is

"empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act."

³⁵ Actually the carriers make whatever contentions seem expedient to them at the time with reference to the relationship existing between them and the ticket agencies. The contentions of the petitioner Modern Air Transport in this respect are typical. In attempting to justify the practice of granting free transportation to its agents, a practice permissible only with respect to employees, Modern's principal officer contended in the Board's general investigation that those agents, while not employees, nevertheless constituted such an integral and important part of its business as to entitle them to free transportation. Tr. 1253. In attempted defense of an injunction action brought against it by the Board, Modern suggested in brief to the Court and contended on oral argument that the agents from whom its traffic was obtained were the carriers, and that Modern was an independent contractor not having carrier status. Judge Coxe thought so little of this contention that he did not even mention it in his opinion. *Civil Aeronautics Board v. Modern Air Transport*, 81 F. Supp. 803 (S.D. N.Y., 1949), *aff'd*. 179 F. (2d) 622 (C.C.A. 2nd, 1950).

Authority is conferred upon the Board to impose conditions upon and modify certificates of public convenience and necessity³⁶ and foreign air carrier permits.³⁷ Broad powers of classification and exemption of carriers from the requirements of the Act upon reasonable conditions and power to establish "just and reasonable rules, and regulations" to be observed by classes of carriers are conferred upon the Board by section 416 (49 U. S. C. 496), and it is to these powers that petitioners owe their existence. The power of visitation and to require reports is conferred by section 407 (49 U. S. C. 487), extending not only to air carriers but to their affiliates and persons controlling them. Authority to prescribe forms of accounts is conferred by the same section. The Board is specifically charged with the duty of enforcing the Act. Sections 1002 and 1007 (49 U. S. C. 642 and 647). These and other substantive provisions of the Act confer almost plenary power in the Board over the practices of air carriers and air transportation, and confer specific authority upon the Board to adopt regulations designed for the purpose of aiding enforcement of the Act and preventing violations thereof. *Gemsco, Inc. v. Walling*, 324 U. S. 244 (1945); cf. *National Broadcasting Co. v. United States*, 319 U. S. 190, 218, 219 (1943). The Board clearly had authority to adopt the regulations here involved to forestall and aid in eliminating the abuses existing in the irregular air carrier field, and would have been authorized and justified in adopting much more stringent regulations than those adopted which in their ultimate analysis are little more than reporting requirements.³⁸

³⁶ Sections 401(f) and (h) (49 U.S.C. 481(f) and (h)).

³⁷ Sections 402(f) and (g) (49 U.S.C. 482(f) and (g)).

³⁸ Any question which might have existed concerning the power of an agency such as the Board to require reports to satisfy itself that unlawful practices are not being followed has been effectively resolved by the recent decision in *United States v. Morton Salt Company*, 338 U.S. 632 (1950). Further, the power to adopt regulations to prevent unlawful practices has long been recognized. *United States v. Morehead*, 243 U.S. 607 (1917); *Gemsco, Inc. v. Walling*, *supra*.

Petitioners contend that the Board is attempting to do by indirection that which it cannot do directly, i. e., to regulate ticket agencies. The Board has not purported to regulate ticket agencies but on the contrary to regulate air carriers. The Board certainly has jurisdiction over air carriers and air transportation. The sale of air transportation is an integral part of that transportation,³⁹ and accordingly the Board has jurisdiction to adopt appropriate regulations governing such sales by air carriers. Any effect that these regulations may have upon ticket agencies or other third persons not before the Court is merely the incidental effect upon third persons resulting from all regulatory measures affecting the operations of carriers. *Accord, Sprunt & Son v. United States*, 281 U. S. 249 (1930); *Edward Hines Trustees v. United States*, 263 U. S. 143 (1923); cf. *Ex-Cell-O Corporation v. City of Chicago*, 115 F. (2d) 627 (C. C. A. 7, 1940) and cases cited therein; *Joint Anti-Fascist Committee v. Clark*, — App. D. C. —, 177 F. (2d) 79, 83 (1949). Further, no legal objection exists to the imposition of requirements upon persons over whom regulatory jurisdiction exists which may prevent action by those persons which could not be prevented by requirements addressed to other parties to the transaction. The entire regulation of businesses affected with a public interest is predicated upon this principle. The public is not, and probably could not be, prevented from purchasing misbranded or impure products, or goods shipped in interstate commerce manufactured other than in accordance with lawful requirements, or from availing themselves of unauthorized services by unlicensed persons or business enterprises, yet these actions clearly can be and are prohibited by requirements addressed to the source of supply or persons offering the service.

Petitioners further contend that, apart from their view that the Board is powerless to take corrective action in the

³⁹ Cf. *McCall v. California*, 136 U.S. 104 (1890); *Di Santo v. Commonwealth of Pennsylvania*, 273 U.S. 34 (1927); *United States Lines Co. v. Civil Aeronautics Board*, 165 F. (2d) 849 (C.C.A. 2, 1948); *Interstate Commerce Commission v. All American Bus Line*, 22 F. Supp. 525 (S.D. N.Y., 1937).

situation here involved because it lacks statutory authority to regulate "brokers", the Act itself expressly contemplates that the Board shall not take any action which might affect relationships between carriers and ticket agents. This view is predicated upon the provisions of section 408(c) of the Act (49 U.S.C. 488(c)) which make inapplicable the provisions of sections 408 and 409 (49 U.S.C. 489) of the Act to the acquisition or control of certain ground facilities, including ticket offices, and the provisions of section 412 (49 U.S.C. 492) which requires the filing for Board approval of only those contracts entered into between carriers. These provisions do not demonstrate any Congressional intent that the Board cannot reach evasion of lawful requirements through the use of ticket agents. On the contrary, the provisions of section 403(b) of the Act prohibiting rebates through agents and brokers demonstrates an affirmative Congressional intent that carriers shall not be permitted to evade lawful requirements through the use of such persons. Further, the Board's regulations are not in conflict with the provisions of the Act relied upon by petitioners. The Board has not attempted to proscribe interlocking relationships between carriers and ticket agencies or to prevent any Irregular Air Carrier from acquiring its own ticket agency. Many such relationships presently are in existence, and the Board has not acted in any manner to disturb those relationships. The Board has only insisted upon a recognition of the relationships actually existing between the carriers and their agents.

Moreover, the Board has not required the filing of contracts for approval but only for information, a power which it clearly possesses. Neither has the Board interfered with petitioners' freedom of contract. They may contract with any agents which they choose. The Board has said only that if contracts are entered into they shall be reduced to writing. Insofar as the question of contracts and understandings to circumvent the Act are concerned, as heretofore stated the Board does not believe that it has imposed any additional regulatory measures in prohibiting carriers from entering into such arrangements. If it has, the pro-

hibition against contracts with agents to conduct forbidden operations is merely incidental to the prohibition against such forbidden operations.

II. *Proper and appropriate procedures were followed in the adoption of the Board's regulations.*

A. *Adequate notice was given to petitioners of the Board's intention to adopt its regulations.*

Petitioners simply cannot sustain their contentions that Draft Release 38 (14 Fed. Reg. 1895, App. 42A-45A) did not constitute proper and adequate notice to them of the content and character of the regulations which the Board later adopted, "because its issuance was so timed and its purpose so camouflaged by misstatements and omissions, that it misdescribed the subjects and issues involved and misled the entire air transportation industry". Even a cursory inspection of that release will disclose that it contained the substance of every requirement contained in the regulations subsequently adopted and fully complied with all requirements of the Administrative Procedure Act.⁴⁰ Fur-

⁴⁰ No requirement exists that the actual text of proposed regulations be incorporated into a rule-making notice, nor does the Administrative Procedure Act prescribe any particular form in which notice shall be given. Section 4(a) of that Act (5 U.S.C. 1003(a)) provides merely that:

"General notice of proposed rule-making shall be published in the Federal Register . . . and shall include (1) a statement of the time, place, and nature of public rule making proceedings, (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."

Apart from the fact that the Administrative Procedure Act does not contain any requirements relating to the caption to be placed upon rule-making notices, the caption of Draft Release 38 as published in the Federal Register satisfies petitioners' objections to the caption appearing upon the Board's mimeographed release. The Federal Register caption, with which petitioners were charged with notice, was "ACCOUNTS, RECORDS, AND REPORTS: CLASSIFICATIONS AND EXEMPTIONS: REPORTING REQUIREMENTS FOR IRREGULAR AIR CARRIERS" (14 Fed. Reg. 1895).

ther, widespread publicity was given to the Board's proposals. Petitioners could not possibly have been misled by Draft Release 38 or have failed to understand the precise action contemplated by the Board if their officials had taken the trouble to examine the draft release or to have kept abreast of current developments in the industry.

Moreover, counsel for the Board are of the view that no legal necessity existed for the promulgation of Draft Release 38. The problem of what corrective action the Board should take with respect to circumvention of lawful requirements through the device of employing ticket agents was fully in issue before the Board in its rule-making proceeding conducted pursuant to Draft Release 33. Written comments upon the Board's much more drastic proposed solution to the problem were received from both carriers and agents. Oral argument was heard thereon, a large portion of which was directed to the specific issue framed by the Board upon that question in Draft Release 33-B (App. 22A). The regulations adopted by the Board lawfully could have been incorporated into Regulation ER-142 (App. 30A) or the Board simply could have announced at the time of the adoption of that regulation that its regulations relating to the use of ticket agents by Large Irregular Carriers would be issued at a later date.

Further, the presence of this issue in the rule-making proceedings upon Draft Release 33, the statements by the Board in the findings accompanying Regulation ER-142 (App. 25A, 26A), and the press release of the Board (App. 42A) summarized in newspapers and trade journals throughout the nation, gave notice to petitioners of the Board's proposals in addition to that contained in Draft Release 38.⁴¹ The entire industry was quite well aware of what the Board had proposed or should have been so aware. The Board followed every possible procedure to afford

⁴¹ Extended comment upon the Board's proposals contained in Draft Release 38 and their assumed effect upon the operations of irregular carriers were contained in the two principal aviation "trade journals". See pages 11 and 12 of the April 25, 1949 issue of "Aviation Week", and page 13 of the May 1, 1949 issue of "American Aviation".

notice of its proposals short of naming all known carriers and agents as respondents in its proceeding and serving them by registered mail. The contentions that petitioners would have commented upon these proposals and have requested a hearing thereon had they been aware of the nature of the Board's proposed action can best be evaluated in the light of their indifference to and lack of participation in the proceedings upon Draft Release 33, even though the Board had announced consideration therein of a proposal much more restrictive than the regulations actually adopted.

B. The regulations properly were adopted pursuant to rule-making procedures.

In addition to contending that Draft Release 38 did not constitute lawful notice of rule-making under the requirements of the Administrative Procedure Act, petitioners further contend that the Board's regulations constituted "adjudication" rather than "rule-making". This view is predicated upon the assertion that the Board's regulations "effectively revoke" or modify their "licenses", and accordingly could have been adopted only by adjudicatory procedures. The contention is made that both the Administrative Procedure Act and the Fifth Amendment required that the Board proceed by way of adjudication rather than rule-making.

As hereinbefore demonstrated, the Board has not revoked petitioners' operating authority nor has it actually modified that authority. Petitioners may conduct precisely the same operations which they were authorized to conduct prior to the Board's regulations. The Board has merely prescribed the method in which those operations shall be conducted, an action clearly constituting "rule-making".⁴²

⁴² "Rule-making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future, but also because it is primarily concerned with policy considerations. The object of the rule-making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct". At-

However, assuming *arguendo* that the form or effect of the Board's regulations constituted an actual modification of petitioners' operating authority or a partial withdrawal thereof, petitioners nevertheless were afforded due process.

At the outset, it should be stated that petitioners' reliance upon the Administrative Procedure Act in support of their contentions in this respect obviously is misplaced. True enough that Act includes "agency process" respecting the "modification, or conditioning of a license" within the definition of adjudication employed therein. Sections 2(d) and (e) (5 U.S.C. 1001(d) and (e)). However, that definition is only for the purpose of specifying the applicability of the various procedural requirements contained therein, and does not constitute a substantive rule of law. The adjudicatory procedures specified in that Act in terms apply only to "adjudication required by statute to be determined on the record after opportunity for an agency hearing . . .". Section 5 (5 U.S.C. 1004). Neither section 416 of the Civil Aeronautics Act nor any other provision thereof requires the Board to determine any action respecting any operating authority granted by way of exemption upon the basis of a record or to hold any hearings in connection therewith (except with reference to certain labor conditions as specified in section 416(b)(2)).⁴³ Further, no provision of the

torney General's Manual on the Administrative Procedure Act, 1947, p. 14.

The form of the Board's regulations forms no basis for the contention that their licenses were modified. These same requirements could have been imposed in the form of a regulation which did not alter the exemption authority under which petitioners operate, or make their observance a condition upon petitioners' operating authority. Petitioners' Letters of Registration always have been conditioned upon observance of all applicable regulations. All penalties prescribed under the Act, including revocation of a Letter of Registration, are the same for violations of either Board regulations, conditions or limitations upon operating authority, or specific sections of the Act. See section 902 of the Act (49 U.S.C. 622) and Part 291(d)(6) of the Economic Regulations (App. 37A).

⁴³ Section 416(b) (49 U.S.C. 496(b)) provides in pertinent part:

"(b)(1) The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this sub-

Civil Aeronautics Act requires a hearing or determination upon a record of any regulation which the Board adopts, notwithstanding the extensive rule-making powers conferred upon the Board thereby. Accordingly, the adjudicatory provisions of the Administrative Procedure Act are in terms inapplicable to any Board action which has the effect of modifying, conditioning, amending or revoking petitioners' operating authority.

It may be contended, of course, that the constitutional requirements of procedural due process compel a construction of the Civil Aeronautics Act to require an adjudicatory type hearing with reference to the Board action here involved for the purpose of saving that Act from invalidity, and accordingly that observance of the adjudicatory procedures specified in the Administrative Procedure Act was mandatory upon the Board. *Sung v. McGrath*, 70 S. Ct. 445, 454 (1950). The Constitution does not compel a con-

section) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

(2) The Board shall not exempt any air carrier from any provision of subsection (1) of section 401 of this title, except that (A) any air carrier not engaged in scheduled air transportation, and (B), to the extent that the operations of such air carrier are conducted during daylight hours, any air carrier engaged in scheduled air transportation, may be exempted from the provisions of paragraphs (1) and (2) of such subsection if the Board finds, after notice and hearing, that, by reason of the limited extent of, or unusual circumstances affecting, the operations of any such air carrier, the enforcement of such paragraphs is or would be such an undue burden on such air carrier as to obstruct its development and prevent it from beginning or continuing operations, and that the exemption of such air carrier from such paragraphs would not adversely affect the public interest. . .".

The requirement of notice and hearing with respect to exemption from the labor provisions of the Act and the failure to require notice and hearing with reference to any other exemption action demonstrates a Congressional intent that notice and hearing be required only where specifically directed.

struction of section 416 of the Act to include a requirement for an adjudicatory type hearing before the Board prior to the taking of action of the type here involved, regardless of whether that action is viewed as a modification or partial withdrawal of petitioners' operating authority. Administrative action limiting or prohibiting future activity or prescribing future standards of conduct is "quasi-legislative" action.⁴⁴ "Licensing" is "adjudication" under the Administrative Procedure Act only because that Act says it is; licensing is legislative in nature. Petitioners are not entitled under the Constitution to "judicial due process" before the Board prior to the modification, alteration, or amendment of their operating authority when that action is predicated upon considerations of regulatory policy of future applicability. The Constitution does not guarantee any hearing, much less an adjudicatory one, before an administrative agency prior to any such legislative action. Congress is under no necessity to provide a hearing before it acts in such cases, and it need not make that requirement when it delegates the task to an administrative agency. The right to judicial review and the protection afforded thereby against arbitrary administrative action satisfies the requirements of due process. *Bowles v. Willingham*, 321 U. S. 503, 519-521 (1944).

This result is one which is required by practical considerations in addition to legal theory. Whatever may be the practical rule where only a few persons are involved, where administrative action governing the future conduct of large numbers of persons or entire industries or segments thereof is concerned, it is generally recognized that no constitutional requirement exists for personal notice to all affected persons or for hearings even though the administrative action involved may have a serious or ruinous impact upon the persons affected thereby. *Bowles v. Willingham*, *supra*; *Bi-Metallic Investment Co. v. State Board*, 239 U. S. 441

⁴⁴ See *Prentis v. Atlantic Coast Line*, 211 U.S. 210, 226 (1908) for Justice Holmes' classic distinction between legislative and judicial action.

(1915); *Pearson v. Walling*, 138 F. (2d) 655, 660 (C.C.A. 8, 1943), *cert. den.* 321 U. S. 775 (1944); *Guisseppi v. Walling*, 144 F. (2d) 608, 615 (C.C.A. 2, 1944), *aff'd.* 324 U. S. 244 (1945); *Willapoint Oysters v. Ewing*, 174 F. (2d) 676, 694 (C.C.A. 9, 1949), *cert. den.* 338 U. S. 860 (1949). Any other result would render Government impotent.

The Board's action in this case falls squarely within the principles of the cited cases. An entire segment of an industry was involved.⁴⁵ The action taken was legislative in character and was predicated upon considerations of regulatory policy of future applicability. No requirement is contained in the Civil Aeronautics Act that this type of action be taken only after hearing or upon a record, nor is such a requirement a constitutional necessity. The only possibly applicable statutory procedure is that contained in Section 4 of the Administrative Procedure Act, and the Board fully complied with the requirements of that Section. Petitioners were not deprived of due process by the Board's action, regardless of whether that action resulted in a modification of their operating authority.⁴⁶

Moreover, the Board did in fact hear argument upon its major action of which the regulations here involved formed only a minor and subsidiary part. Petitioners had full notice of the Board's proposals relating to use of ticket agents contained in Draft Release 33. They could have been heard in argument before the Board upon that proposal had they wished. Similarly, they were at liberty to file comments upon Draft Release 38, and to request a hearing if they had desired one. Whether a hearing would have been granted pursuant to such a request is beside the point. Petitioners simply failed to pursue or avail themselves of

⁴⁵ There were approximately 140 Letters of Registration outstanding to Large Irregular Carriers at the time of circulation for comment of Draft Release 38.

⁴⁶ The procedure followed by the Board in this case is the procedure by which petitioners were created, and the procedure employed in all Board actions affecting them as a classification of carriers.

their administrative remedies, and cannot predicate a denial of due process upon their own failure in this respect.⁴⁷

CONCLUSION

Upon the basis of the foregoing reasons and authorities, the Court should affirm the Board's regulations herein.

Respectfully submitted,

EMORY T. NUNNELEY, JR.,
General Counsel.

JOHN H. WANNER,
Associate General Counsel.

O. D. OZMENT,
Attorney, Civil Aeronautics Board.
Attorneys for Respondent.

APRIL, 1950.

⁴⁷ Petitioners also contend that the Board erred in not formally reciting that its action in adopting its regulations was in the public interest. The Board stated the reasons why its action was deemed necessary to the exercise and performance of its powers and duties, and it is not believed that any formal finding of public interest is required to accompany regulations such as are here involved. If the Board erred in this respect, however, the error is a technical omission which the Court will permit the Board to supply without setting aside the regulations. *Twin City Milk Producers Assn. v. McNutt*, 122 F. (2d) 564, 123 F. (2d) 396 (C.C.A. 8, 1941).

